UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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| IN RE: | . | Case No. 09-50026-reg<br>Chapter 11 |
| MOTORS LIQUIDATION COMPANY, et al., f/k/a GENERAL MOTORS CORP., et al, | . | (Jointly administered) |
| Debtors. | . | One Bowling Green<br>New York, NY 10004 |
| | . | Wednesday, October 14, 2015<br>9:46 a.m. |

TRANSCRIPT OF ORAL ARGUMENT RE: SCHEDULING ORDER SIGNED ON 9/3/15 REGARDING CASE MANAGEMENT ORDER RE: NO-STRIKE, NO STAY, OBJECTION, AND GUC TRUST ASSET PLEADING [13416]; MEMORANDUM ENDORSED ORDER SIGNED ON 9/3/15 REGARDING SCHEDULING ORDER [13417]; LETTER REGARDING PUNITIVE DAMAGES ISSUE, DATED 9/13/15, FILED BY GARY PELLER ON BEHALF OF SHARON BLEDSOE [13432]; POST-CLOSING IGNITION SWITCH ACCIDENT PLAINTIFF'S MEMORANDUM OF LAW WITH RESPECT TO PUNITIVE DAMAGES ISSUE, DATED 9/13/15, FILED BY WILLIAM P. WEINTRAUB ON BEHALF OF HILLIARD MUNOZ GONZALEZ LLP AND THOMAS J. HENRY INJURY ATTORNEY [13434]; JOINDER OF THE IGNITION SWITCH PLAINTIFFS AND NON-IGNITION SWITCH PLAINTIFFS TO THE POST-CLOSING IGNITION SWITCH ACCIDENT PLAINTIFFS' MEMORANDUM OF LAW WITH RESPECT TO PUNITIVE DAMAGES, DATED SEPTEMBER 13, 2015, FILED BY STEVE BERMAN ON BEHALF OF IGNITION SWITCH PLAINTIFFS, NON-IGNITION SWITCH PLAINTIFFS [13436]; OPENING BRIEF BY GENERAL MOTORS LLC WITH RESPECT TO WHETHER PLAINTIFFS MAY SEEK PUNITIVE DAMAGES FROM GENERAL MOTORS LLC BASED ON THE CONDUCT OF GENERAL MOTORS CORPORATION, DATED SEPTEMBER 13,2015, FILED BY ARTHUR JAY STEINBERG ON BEHALF OF GENERAL MOTORS LLC [13437]; (CONTINUED)

**BEFORE THE HONORABLE ROBERT E. GERBER**
**UNITED STATES BANKRUPTCY COURT JUDGE**

APPEARANCES CONTINUED.

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TRANSCRIPT OF: (CONTINUED)
POST-CLOSING IGNITION SWITCH ACCIDENT PLAINTIFFS' REPLY WITH RESPECT TO PUNITIVE DAMAGES ISSUE, DATED 9/22/15, FILED BY WILLIAM P. WEINTRAUB ON BEHALF OF POST-CLOSING IGNITION SWITCH ACCIDENT PLAINTIFFS [13459];
REPLY BRIEF BY GENERAL MOTORS LLC WITH RESPECT TO WHETHER PLAINTIFFS MAY SEEK PUNITIVE DAMAGES FROM GENERAL MOTORS LLC BASED ON THE CONDUCT OF GENERAL MOTORS CORPORATION, DATED SEPTEMBER 22, 2015, FILED BY ARTHUR JAY STEINBERG ON BEHALF OF GENERAL MOTORS LLC [13460];
JOINDER OF THE IGNITION SWITCH PLAINTIFFS AND NON-IGNITION SWITCH PLAINTIFFS TO THE POST-CLOSING IGNITION SWITCH ACCIDENT PLAINTIFFS' REPLY WITH RESPECT TO PUNITIVE DAMAGES ISSUE, DATED SEPTEMBER 22,2015, FILED BY STEVE BERMAN ON BEHALF OF IGNITION SWITCH PLAINTIFFS, NON-IGNITION SWITCH PLAINTIFFS [13461];
BRIEF OF MOORE PLAINTIFFS REGARDING PUNITIVE DAMAGES ISSUE, DATED 9/13/15;
LETTER ELLIOTT, SESAY, AND BLEDSOE PLAINTIFFS JOINING THE BRIEF OF OTHER PARTIES ON IMPUTATION ISSUE, DATED 9/18/15, FILED BY GARY PELLER ON BEHALF OF SHARON BLEDSOE [13448];
OPENING BRIEF BY GENERAL MOTORS LLC WITH RESPECT TO WHETHER PLAINTIFFS CAN AUTOMATICALLY IMPUTE TO NEW GM KNOWLEDGE OF THE EVENTS THAT TOOK PLACE AT OLD GM AND/OR AS REFLECTED IN OLD GM'S BOOKS AND RECORDS, DATED 9/18/15, FILED BY ARTHUR JAY STEINBERG ON BEHALF OF GENERAL MOTORS LLC [13451];
OPENING BRIEF ON IMPUTATION ISSUE, 9/18/15, FILED BY STEVE BERMAN ON BEHALF OF IGNITION SWITCH PLAINTIFFS, NON-IGNITION SWITCH PLAINTIFFS, STATE OF ARIZONA EX REL. MARK BRNOVICH, THE ATTORNEY GENERAL, THE ADAMS PLAINTIFFS, THE PEOPLE OF THE STATE OF CALIFORNIA, ACTING BY AND THROUGH ORANGE COUNTY DISTRICT ATTORNEY TONY RACKAUCKAS, THE POST-CLOSING IGNITION SWITCH ACCIDENT PLAINTIFFS [13452];
DOCUMENT FILED UNDER SEAL OPENING BRIEF ON IMPUTATION ISSUE ON BEHALF OF THE IGNITION SWITCH PLAINTIFFS, THE NON-IGNITION SWITCH PLAINTIFFS, THE STATE OF ARIZONA, THE PEOPLE OF THE STATE OF CALIFORNIA, THE POST-CLOSING IGNITION SWITCH ACCIDENT PLAINTIFFS AND THE ADAMS PLAINTIFFS, DATED 9/21/15, FILED BY STEVE BERMAN ON BEHALF OF THE ADAMS PLAINTIFFS, THE POST-CLOSING IGNITION SWITCH ACCIDENT PLAINTIFFS, IGNITION SWITCH PLAINTIFFS, NON-IGNITION SWITCH PLAINTIFFS, STATE OF ARIZONA EX REL. MARK BRNOVICH, THE ATTORNEY GENERAL, THE PEOPLE OF THE STATE OF CALIFORNIA, ACTING BY AND THROUGH ORANGE COUNTY DISTRICT ATTORNEY TONY RACKAUCKAS [13454];

TRANSCRIPT OF: (CONTINUED)
REPLY BRIEF BY GENERAL MOTORS LLC WITH RESPECT TO WHETHER PLAINTIFFS CAN AUTOMATICALLY IMPUTE TO NEW GM KNOWLEDGE OF THE EVENTS THAT TOOK PLACE AT OLD GM AND/OR AS REFLECTED IN OLD GM'S BOOKS AND RECORDS, DATED SEPTEMBER 30, 2015, FILED BY ARTHUR JAY STEINBERG ON BEHALF OF GENERAL MOTORS LLC [13482];
REPLY BRIEF ON IMPUTATION ISSUE ON BEHALF OF THE IGNITION SWITCH PLAINTIFFS, THE NON-IGNITION SWITCH PLAINTIFFS, THE STATE OF ARIZONA, THE PEOPLE OF THE STATE OF CALIFORNIA, THE POST-CLOSING IGNITION SWITCH ACCIDENT PLAINTIFFS AND THE ADAMS PLAINTIFFS, DATED 9/30/15, FILED BY STEVE BERMAN ON BEHALF OF IGNITION SWITCH PLAINTIFFS, NON-IGNITION SWITCH PLAINTIFFS, STATE OF ARIZONA EX REL. MARK BRNOVICH, THE ATTORNEY GENERAL, THE PEOPLE OF THE STATE OF CALIFORNIA, ACTING BY AND THROUGH ORANGE COUNTY DISTRICT ATTORNEY TONY RACKAUCKAS [13483];
NEW GM BELLWETHER LETTER, WITH MARKED BELLWETHER COMPLAINTS, PURSUANT TO SCHEDULING ORDER DATED 9/3/15, DATED 9/21/15, FILED BY ARTHUR JAY STEINBERG ON BEHALF OF GENERAL MOTORS LLC [13456];
LETTER FILED ON BEHALF OF GENERAL MOTORS LLC REGARDING OTHER PLAINTIFFS' COMPLAINTS, DATED 9/23/15, FILED BY ARTHUR JAY STEINBERG ON BEHALF OF GENERAL MOTORS LLC [13466];
NEW GM MDL COMPLAINT LETTER, WITH MARKED MDL COMPLAINT, PURSUANT TO SCHEDULING ORDER DATED 9/3/15, DATED 9/25/15, FILED BY ARTHUR JAY STEINBERG ON BEHALF OF GENERAL MOTORS LLC [13469];
NEW GM STATES COMPLAINTS LETTER, WITH MARKED STATES COMPLAINTS, PURSUANT TO SCHEDULING ORDER DATED 9/3/15, DATED 9/25/15, FILED BY ARTHUR JAY STEINBERG ON BEHALF OF GENERAL MOTORS LLC [13470];
LETTER DATED 9/28/15 TO JUDGE GERBER FROM WILLIAM P. WEINTRAUB RE: RESPONSE TO NEW GM BELLWETHER LETTER AND MARKED BELLWETHER COMPLAINTS, DATED 9/28/15, FILED BY WILLIAM P. WEINTRAUB ON BEHALF OF HILLIARD MUNOZ GONZALES LLP AND THOMAS J. HENRY INJURY ATTORNEY [13475];
LETTER ON BEHALF OF CAROLYN RICKARD, ADM'X. OF THE ESTATE OF WILLIAM RICKARD, DECEASED, IN RESPONSE TO GENERAL MOTORS, LLC'S LETTER REGARDING OTHER PLAINTIFFS' COMPLAINTS, DATED 9/29/15, FILED BY JULIANNE CUTRUZZULA BEIL ON BEHALF OF CAROLYN RICKARD [13478];
LETTER ON BEHALF OF THE ELLIOTT, SESAY AND BLEDSOE PLAINTIFFS REGARDING NEW GM'S MARKED PLEADINGS LETTER, DATED 9/29/15, FILED BY GARY PELLER ON BEHALF OF SHARON BLEDSOE [13479];
RESPONSIVE LETTER FROM MOORE PLAINTIFFS REGARDING OTHER PLAINTIFFS' COMPLAINT, DATED 9/30/15;
LETTER RESPONSE TO NEW GM MARKED STATE COMPLAINTS [13470];

TRANSCRIPT OF: (CONTINUED)
EXPLANATORY LETTER, DATED 10/9/15, FILED BY STEVE BERMAN ON BEHALF OF STATE OF ARIZONA EX REI. MARK BRNOVICH, THE ATTORNEY GENERAL, THE PEOPLE OF THE STATE OF CALIFORNIA, ACTING BY AND THROUGH ORANGE COUNTY DISTRICT ATTORNEY TONY RACKAUCKAS [13494];
LETTER RESPONSE TO NEW GM'S MARKED MDL COMPLAINT [13469];
EXPLANATORY LETTER, DATED OCTOBER 9, 2015, FILED BY STEVE BERMAN ON BEHALF OF IGNITION SWITCH PLAINTIFFS, NON-IGNITION SWITCH PLAINTIFFS [13495];
PEOPLE OF THE STATE OF CALIFORNIA'S "NO STRIKE" PLEADING, DATED JUNE 16, 2015, FILED BY STEVE BERMAN ON BEHALF OF THE PEOPLE OF THE STATE OF CALIFORNIA, ACTING BY AND THROUGH ORANGE COUNTY DISTRICT ATTORNEY TONY RACKAUCKAS [13210];
STATE OF ARIZONA'S "NO STRIKE" PLEADING, DATED 6/16/15, FILED BY STEVE BERMAN ON BEHALF OF STATE OF ARIZONA EX REL. MARK BRNOVICH, THE ATTORNEY GENERAL [13211];
THE IGNITION SWITCH PLAINTIFFS' NO STRIKE PLEADING WITH REGARD TO THE SECOND AMENDED CONSOLIDATED COMPLAINT; AND THE NON-IGNITION SWITCH PLAINTIFFS' (I) OBJECTION PLEADING WITH REGARD TO THE SECOND AMENDED CONSOLIDATED COMPLAINT AND (II) GUC TRUST ASSET PLEADING, DATED 6/24/15, FILED BY EDWARD WEISFELNER ON BEHALF OF DESIGNATED COUNSEL FOR THE IGNITION SWITCH PLAINTIFFS & CERTAIN NON-IGNITION SWITCH PLAINTIFFS [13247];
OMNIBUS RESPONSE BY GENERAL MOTORS LLC TO THE NO STRIKE PLEADINGS FILED BY THE STATES OF ARIZONA AND CALIFORNIA, DATED 7/10/15, FILED BY ARTHUR JAY STEINBERG ON BEHALF OF GENERAL MOTORS LLC [13286];
RESPONSE BY GENERAL MOTORS LLC TO THE IGNITION SWITCH PLAINTIFFS' NO STRIKE PLEADING WITH REGARD TO THE SECOND AMENDED CONSOLIDATED COMPLAINT; AND THE NON-IGNITION SWITCH PLAINTIFFS' OBJECTION PLEADING WITH REGARD TO THE SECOND AMENDED CONSOLIDATED COMPLAINT, DATED 7/23/15, FILED BY ARTHUR JAY STEINBERG ON BEHALF OF GENERAL MOTORS LLC [13316];
ADAMS PLAINTIFFS' NO DISMISSAL PLEADING, DATED 8/11/15, FILED BY GREGORY W. FOX ON BEHALF OF HILLIARD MUNOZ GONZALES LLP AND THOMAS J. HENRY INJURY ATTORNEY [13359];
RESPONSE BY GENERAL MOTORS LLC TO ADAMS PLAINTIFFS' NO DISMISSAL PLEADING, DATED 9/30/15, FILED BY ARTHUR JAY STEINBERG ON BEHALF OF GENERAL MOTORS LLC [13422];
STATEMENT OF GOOD FAITH FILING, DATED 9/4/15, FILED BY JULIANNE CUTRUZZULA BEIL ON BEHALF OF CAROLYN RICKARD [13423]

APPEARANCES:

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(Proceedings commence at 9:46 a.m.)

THE COURT: Good morning. Have seats, please. I think I know most of the people who've been speaking before. If anybody else expects to be heard, I'll provide that opportunity. I do have some preliminary remarks.

First, I heard just as I was walking in, quite to my surprise, that there had been some request for breakout loans and contemplation that we'd be here all day. That's not my concept of what we're here for today. We're going to focus on some just gradations, and I would expect that we'd be done by 11:30 or something in that range.

I want you folks to spend most of your time on punitives, and in particular whether punitives are going to assume liability or not. I don't need much help on imputation, and although I'm not going to put a sock in your mouth on that, I think the briefs are pretty clear and I understand the issues on imputation.

On the matter of punitive damages, I want you to talk principally about whether there is assumed liability for punitives under the sale agreement, and if not, whether plaintiffs can still rely on Old GM conduct as either a predicate for punitives or for increasing punitives that are otherwise awarded. I'm not sure why there might be a distinction on the latter issue, but if you think there is, you can tell me.

The plaintiffs' side, particularly Mr. Weintraub, speak in terms of my gatekeeper role, which subject to your rights to be heard is the same way that I see my role on this. It seems to me that my job is to construe the sale order, the sale agreement, my opinions and the judgment, and based upon those things, to determine whether claims get past the bankruptcy gate.

There is a lot of discussion in the briefs about the extent to which particular claims principally under state law are within my domain to rule upon. Many of those, perhaps all of those, turn on whether, as a matter of non-bankruptcy law, there is a duty on the part of New GM to do various things. It seems to me, subject to your rights to be heard, that with one possible exception, those are matters for Jesse Furman to address or, to the extent applicable, judges here in the primary litigation, vis-à-vis anything that's gotten through the gate. But if somebody believes that that's an inappropriate way to look at it, I'll certainly allow discussion of that.

One area where I do welcome that discussion, though, is that the law is clear, I think, that we can't tolerate successor liability claims dressed up to look like something else, and it may be that that's still my job to decide. I would like help from both sides on what is at issue besides the matter of punitives, imputation, and in terms of the pleadings.

There's a lot of stuff thrown in on plaintiffs under the rubric of background, which is problematic to me. But to the extent there are other conceptual things as evidenced in your pleadings, they may have gotten past me, and I need you to bring those to my attention.

I don't know if Mr. Berman is in the court today. Oh, are you, Mr. Berman? First time for you. Okay.

MR. BERMAN: Yes. First time in a bankruptcy court, Your Honor, so I hope you'll be kind.

THE COURT: That's fine. Mr. Berman, your joinder in paragraph one joined in part two of your allies' submissions, but not part one. It would be helpful for me, before we moved on, if I -- if you'd tell me whether I should draw some significance from that, what exactly that means.

Mr. Weintraub, in your supplemental letter in the marked pleadings, I'd like you to clarify for me what you meant by the last sentence of paragraph one, which I didn't follow, and also paragraph two. It wasn't clear to me whether you were trying to reserve rights that I'd already -- on issues that I've already ruled on. I think it's less likely that you intended to relitigate those or whether you were pointing out or trying to point out that there was something else that I needed to focus on, but I need your help on that.

I don't see Mr. Peller here today. Okay. Mr. Peller, in a letter sent, commented on New GM's failure to

address his Elliott, Bledsoe and Sesay pleadings the same way that New GM has addressed anybody else's, and he estimated default New GM on that. I'm not going to default New GM on that given everything else that's gone on here.

Mr. Steinberg, not this minute, but after the arguments, I want you to call up Mr. Peller and ask him if he really wants you to repeat the process for his clients like you did for everybody else. And if he does -- and I'm going to have to make you do a similar response like you did for everybody else -- that will be decided on the papers.

Okay. With that, I'll allow each of you to be heard. Go ahead and deal with the principal discussion on punitives, not on imputation.

MR. WEINTRAUB: Do you care --

MR. WEISFELNER: Who would you like to hear first? I'll give you both a chance to reply and surreply.

MR. WEINTRAUB: You called my name first.

THE COURT: Go ahead, Mr. Weintraub.

MR. WEINTRAUB: Thank you, Your Honor.

MR. WEISFELNER: The only thing is that I'll be speaking on all the issues. I don't think Mr. Weintraub is going to be speaking on all the issues.

THE COURT: Well, you can hand off to your allies, Mr. Weintraub. I just want to get it all done.

MR. WEINTRAUB: Sure. Believe me, Your Honor, so do

I. With respect, Your Honor, I'll begin with the Court's questions to me, and then I'll go into my presentation.

We do believe that punitive damages are an assumed liability. In terms of the Court's gatekeeping role, I think if -- what I heard the Court say is that the gatekeeping role is not to decide the underlying merits of issues, but rather whether issues can pass through the gate to be decided by the trial court, and we agree with that. And I think what I heard you --

THE COURT: Oh, I assumed that you would agree with that. That was the exact point you were making in your briefs.

MR. WEINTRAUB: Yes, Your Honor.

THE COURT: It's Mr. Steinberg that's going to want to be heard on that much more than you will, I suspect.

MR. WEINTRAUB: If we have time, Your Honor, Mr. Steinberg will. And we also agree, Your Honor, that the -- whether there is a duty, the existence of the duty is a matter for the trial court, and opposing the existence of duty is a matter of defending against the action.

We believe, Your Honor, that if the liability for punitive damages is an assumed liability, that all of Old GM's conduct is fair game because you do not get to punitive damages unless you get to compensatory damages, which would require a showing of causation and fault. And because punitive damages are parasitic to compensatory damages and there is no

limitation in the sale agreement to just compensatory damages, we believe that punitive damages would flow if elements of the injury sustained by the plaintiff are as a result of what we would call reprehensible conduct by New GM.

THE COURT: You said repeatedly, Mr. Weintraub, that the sale agreement, and possibly the sale order, as well, in your view, are unambiguous and are unambiguous in your favor. I had some difficulty with that, particular in light of something that Mr. Steinberg pointed out in one of his briefs, where he points out that except for those liabilities that are assumed, everything else is a retained liability. And his recognition of the fairly fundamental principle that we read contractual agreements as a whole so that everything has a meaning, that would lead me to conclude not that it's unambiguous in Mr. Steinberg's favor, but that it isn't unambiguous and that I have to look at the totality of the language and the relevant documents and divine the intention of the parties back in 2009.

Help me understand better, if you're still pressing the point, why you think it's unambiguous in your favor.

MR. WEINTRAUB: Your Honor, we are pressing the point. We think that under the plan and unambiguous language of the sale agreement, New GM assumed liability for punitive damages. If you look at Section 2.3(a)(9), the section begins with all Liabilities -- capital L, all Liabilities -- is a very

broad term, and there is -- as we cited in our papers, there is no more clear word in the English language than the word "all." All is --

THE COURT: You don't think that "all" is fleshed out by the four, five, or six words that follow it?

MR. WEINTRAUB: I think that "all" is fleshed out by the word "liabilities." And if you look at the definition of liabilities, and I will read it to the Court, liabilities means:

> "Any and all liabilities and obligations of every kind and description whatsoever, whether such liabilities or obligations are known or unknown, disclosed or undisclosed, matured or unmatured, accrued, fixed, absolute, contingent, determined or undeterminable, on or off balance sheet or otherwise, or due or to become due, including indebtedness and those obligations arising under any law, claim, order, contract or otherwise.

That is a very, very expansive definition, Your Honor, and there is nothing in the language of Section 2.3(a)(9) that indicates an intention to curtail the operation of the word "liabilities," the defined term "liabilities."

The word "Damage" is used elsewhere in the agreement, with a capital D, and damages excludes punitive damages. Notably, the word "Damage" with a capital D is not used in

Section 2.3(a)(9), and it is not used in the defined term "liabilities." If the parties wanted to exclude punitive damages, they could have used the word "damages" in Section 2.3(a)(9), but they did not.

The other thing the parties could have done in Section 2.3(a)(9), but did not, was include a parenthetical exclusion for punitive damages. If you look at Section 2.3(a)(9), there is a parenthetical exclusion for asbestos claims. We also know, Your Honor, that Section 2.3(a)(9) was amended before the sale agreement closed. So it shows that that section of the purchase agreement was under some level of scrutiny, and even though they went back for a second time to amend Section 2.3(a)(9), it was not amended to exclude the word "punitive damages." If the parties wanted to exclude punitive damages, there was a very easy way to do that. They could have said "and not punitive damages." They didn't do that.

As I said, Your Honor, the case law in the Second Circuit is that punitive damages are parasitic to compensatory damages. There is nothing in Section 2.3(a)(9) that limits damages to compensatory damages. Once you have compensatory damages, if appropriate under the law, the punitive damages may follow based upon the reprehensible conduct of the actor.

In terms of whether or not the word "direct" detracts from that, we don't think that it does. The way Section 2.3(a)(9) works and the way punitive damages works is that it's

specific to the injured party. And the cases that limit the ability to recover punitive damages, and we cite them in our briefs, are basically based upon the Gore factors, and the Gore factors include not charging the bad actor with liability for other people, only charging them with liability to the injured person. They require a proportionality between the actual damages suffered and the punitive damages that are assessed.

But for the reprehensible conduct of Old GM, but for the accident that occurred, but for the compensatory damages, there wouldn't be punitive damages. If these were not post-sale accident victims, there would be no basis for punitive damages. What gives the basis for punitive damages is the fact that there is compensatory damages based upon fault and causation. Once you've got fault and causation, the punitive damages are appropriate to compensate for reprehensible conduct.

Now, one of the things that New GM says in their papers is that punitive damages are intended to detract third parties, to deter repeat offenses by the offender and therefore makes no sense in the context of this case because Old GM has been liquidated, there's nothing to deter. What New GM leaves out of its argument, and frankly leaves out of the quote from the State Farm case, which is a case cited by both parties, is that one of the purposes of punitive damages is retribution. And retribution is a very direct and very personal remedy for

someone who has been harmed by reprehensible conduct. It's almost biblical, Your Honor. It's in the nature of an eye for an eye. So it is about as direct as you can get with respect to whether there needs to be a direct relationship between the accident, the injury, the causation and the punitive damages.

So I don't think that the word "directly" is imbued with the magical powers that New GM is saying that it's imbued with and would take it out of -- use the word "directly" as a springboard to say that there is an exclusion for punitive damages.

We also think, Your Honor, that there are two other paths to punitive damages through independent claims. Our view is that there is a difference between Old GM conduct and New GM conduct based upon information that was available to and known by New GM, no matter what the source of that information. So with respect to the first path to punitive damages through independent claims based upon inherited information, which would be information that came to New GM when the employees were transferred, that came to New GM when the books, records, databases, reports, investigations were transferred, that information is fair game because that informs what New GM knew when it acted or didn't act in --

THE COURT: Pause, please, Mr. Weintraub. Under theory number two or your leg number two, to what extent is that the same or different than any other independent claim?

MR. WEINTRAUB: I think that we have two species of independent claims. One independent claim would be based upon what we believe is inherited knowledge, and we think that that's fair game. We think that the Court essentially ruled that way in the Bledsoe decision. We also say that even if the Court decides that you cannot use inherited information, information developed by New GM after the date of closing of the sale would be sufficient to present a claim for punitive damages.

We know that the -- that New GM just entered into a $900 million settlement with the federal government based upon a stipulated set of facts and based upon a deferred prosecution agreement. The gravamen of that agreement was an acknowledgment by New GM in the statement of facts that according to it, it first was able to determine the relationship between air bags not deploying in cars with the ignition switch defect and the electronics of the vehicle such that when the ignition was in the off or auxiliary position, the sensor on the air bag would be disengaged and would not engage the air bag when there was an accident.

And what the stipulated set of facts in that -- what the government concedes is that that connection was first made by New GM in 2012. We don't concede that that is true. We think the connection was made earlier, but for purposes of what they have admitted to with the government, they first realized

a connection in 2012, yet they delayed the recall for two years. Five of the six bellwether plaintiffs were injured within that two-year period from 2012 to 2014. So our view is even if you ignore all of the inherited and accumulated information, based upon GM's admission that it realized the connection between the ignition switch defect, the electronics and the non-deployment of the air bags in 2012, that's well after the closing of the sale.

Now, notably, Your Honor, New GM did not say to the federal government, you know, hey, that's really a retained liability, that's not our liability, so what you need to do is go to the bankruptcy court, make a motion for leave to file a late $900 million claim, and assuming the Court even would have let you file your late $900 million claim, it's likely going to be equitably moot based upon the April 2015 decision.

But, of course, I'm being facetious. They didn't say or do that. They knew that it was their liability. It's an independent liability, and the claims by the post-sale accident victims in five of the six bellwethers are during the same time period and basically for the same thing. We had an accident, our air bags didn't deploy, we were injured grievously, some of us were killed during the same time period. It's clearly an independent claim as acknowledged by New GM, Your Honor.

So we think that whether as an assumed liability because the word "direct" doesn't take them out of the penalty

box and because anything that arose from the causation, the injury to the defendant and the facts and circumstances surrounding Old GM's conduct with respect to that is fair game with respect to punitive damages. That's pathway number one to punitive damages.

Pathway number two to punitive damages is separate and apart from whether or not you ever need to get into the 2.3(a)(9) argument that it's an independent claim based upon information that was inherited by New GM. New GM knew about the ignition switch defect based upon that inherited information and knew about all of the problems. Just like this Court said that Old GM should have recalled the vehicles at the time of the sale, New GM should have recalled the vehicles immediately after the sale, but it didn't do that. It didn't do that until 2014.

The third path to punitive damages would be what we call the information developed solely by New GM post-sale, the thing that I was just talking about. In addition, Your Honor, we think there are two due process issues with respect to the ability to assert successor liability claims against New GM. These are post-sale accident victims. What was briefed with respect to the four threshold issues were pre-sale accidents.

With respect to post-sale accidents, you have people falling into two categories, people that already owned their vehicle at the time of the sale and people that acquired their

vehicle after the sale. With respect to the people that acquired their vehicle before the sale, at the time of the sale, they were known creditors. They didn't get constitutionally sufficient notice. They were not told about the ignition switch defect in their vehicles. There is a fundamental difference between these particular plaintiffs who subsequently had an accident and people who objected to the sale at the time of the sale on general principles of successor liability.

And the difference is that people who had post-sale accidents did not know that they had much higher odds than any other objector of having an accident because they were driving in a defective vehicle, unknown to them, but known to New GM -- I'm sorry, Old GM -- known to Old GM at the very time that it was asking this Court to sell the assets free and clear. We think that because these post-sale accident victims were not told that they were riding in defective vehicles at the time of the sale and didn't have an opportunity to raise the objection to successor liability based upon an unknown defect that would cause a future accident, that they were prejudiced. And that would fall within the Court's analytics for what you need to show to not have the sale order apply to you. They were clearly prejudiced, Your Honor.

THE COURT: Let's make sure we're on the same page on that. New GM had expressly assumed personal injury and death

liability for people of the character you just described --

MR. WEINTRAUB: Yes.

THE COURT: -- who were in post-sale accidents. And your point is that New GM should not be immune from punitives to people who were injured or killed or the survivors of such for those post-sale accidents.

MR. WEINTRAUB: Exactly, Your Honor.

THE COURT: That much I understand, but I'm less clear on whether you're saying that the premise for the punitives for the post-sale accident victim should be pre-sale conduct as well as post-sale knowledge and conduct.

MR. WEINTRAUB: I think it could be both, Your Honor, but with respect to this particular argument, the point of this argument is if the Court rules that 2.3(a)(9) bars punitive damages with respect to these post-sale accident victims, with respect to this subcategory of post-sale accident victims, those who owned the vehicle at the time of the sale, notwithstanding the fact that 2.3(a)(9) might bar punitive damages, which we dispute, this due process issue would say that New GM can be a successor for purposes of punitive damages based upon the pre-sale conduct of Old GM. We also think that because New GM delayed the recall, as admitted, up until past the time that these people were injured, that its conduct, independently would give it liability for punitive damages. So it's both, Your Honor, as this --

THE COURT: Okay.

MR. WEINTRAUB: Now, with respect to the second category of claimant, those who did not own their vehicles at the time of the sale but acquired them later, we think that those are the archetypal future claimants talked about in Grumman Olson. Those are the people that could not possibly have been given meaningful notice because they had no connection with the debtor at the time of the sale. And just like in Grumman Olson, we believe that there should be successor liability for these purely future claimants, and there would be no bar on punitive damages by those claimants if they can demonstrate that the conduct to them was reprehensible.

THE COURT: Uh-huh, okay.

MR. WEINTRAUB: If I could just take a minute, Your Honor. As usual, you took me right out of my presentation, and I want to make sure --

THE COURT: Check your notes. Sure, go ahead.

MR. WEINTRAUB: -- make sure that I hit everything that I did -- I wanted to hit. Yeah, there are a couple things I -- a couple points I'd like to make, Your Honor.

One of the cases that we cite is the Virgilio (ph) case, and we think that that's a highly instructive case. In the Virgilio case, the statute enacting the 9/11 victims fund provided that by opting into the fund, the claimant waived all

claims for recovery of damages against anyone other than the terrorists. The estates of certain firefighters in that case that died in the Twin Towers when they collapsed who had opted into the victims' fund wanted to sue Motorola and the City of New York for providing defective radios that didn't work within the concrete structure of the tower, and therefore those firefighters couldn't be told to evacuate the tower because it was collapsing.

The plaintiffs argued that, per the statute, when they opted into the fund, they only waived compensatory damages, but could still sue for punitive damages. In other words, their position was we could sue for just punitive damages. The Second Circuit rejected the plaintiffs' argument and affirmed the district court's ruling that the claim was barred. The Second Circuit held that because of the parasitic relationship between compensatory damages and punitive damages, once the compensatory damages were waived, there was no path for punitive damages, so those were effectively waived, too.

In this case, Your Honor, we've got the converse which would also be true. There is no limitation in this agreement to just compensatory damages. Because of the parasitic relationship between compensatory damages and punitive damages, if there's a claim for compensatory damages, then the parasite, punitive damages travels along with it and would only be barred if expressly excluded. And as we said

earlier, Your Honor, we don't believe that it was expressly excluded.

THE COURT: On that 9/11 radios case, can you give me the cite on that case?

MR. WEINTRAUB: Yeah. That's 407 F.3d 105 (2nd Cir. 2005).

THE COURT: Thanks.

MR. WEINTRAUB: The other case we wanted to talk about, Your Honor, also cited in our brief, is the Maverick Tube case, which I think is an excellent example of contract interpretation. In Maverick Tube, the issue was whether the buyer was a public acquirer as defined in the indenture. The definition in the indenture of a public acquirer was an entity whose common stock traded on a national U.S. exchange. The nature of the dispute was whether or not the particular buyer in that instance was a public acquirer.

That buyer's ordinary common stock did not trade on a national U.S. exchange, and therefore would not be considered a public acquirer, and then certain rights would not be triggered for the bondholders. But the indentured trustee argued that certain depository shares that were not common stock did trade on a national U.S. exchange, so the issue was whether, as a matter of commercial reasonableness, the contract could be interpreted to provide that common stock could include these depository shares and therefore come to the conclusion that

this was a public acquirer.

And the Court refused to read the contract the way the indentured trustee wanted it read. And what the Court said in connection with that, I think, is very instructive for what we're dealing with here. The Second Circuit says, at Pages 464 and 472 -- and the cite for this case I will give you, Your Honor, is 50 -- no, that's the wrong case. Let me read the quote and then I'll find you the citation, Your Honor.

THE COURT: Sure.

MR. WEISFELNER: Your Honor, the citation is 595 F.3d 458. It's a 2010 decision.

THE COURT: Okay, thanks.

MR. WEINTRAUB: What the Second Circuit said, Your Honor, is:

"The parties could easily have included in the indenture a definition of common stock in general with a parenthetical phrase expressly including ADSs, such as the parenthetical in the definition of 'capital stock,' or they could have included such a parenthetical after common stock in the 'a class of common stock traded on a United States national securities exchange' clause in the public acquirer definition. They did neither. Given that the parties defined more than 100 terms in the indenture and made explicit reference to ADSs in the 'capital

stock' definition that informs the rights of noteholders to require Maverick to purchase their notes, the indenture as a whole does not suggest that the undefined term 'capital stock,' in the public acquirer definition that informs noteholders' conversion rights, includes ADSs implicitly."

The Court -- Second Circuit goes on to say:

"Any suggestion that the indenture should be read to accomplish what the trustee views as 'commercially reasonable' essentially asks us to rewrite the indenture's public acquirer definition. Instead, we are required to give effect to the intentions expressed in the agreement's own language. Given the pains taken by the parties to have the indenture set out detailed definitions of numerous terms and to have its definition of capital stock make explicit reference to ADSs -- a reference we are not entitled to regard as superfluous -- we conclude that the district court properly declined to read ADSs into the undefined term 'common stock,' as used in the clause 'common stock traded on a United States national securities exchange' without elaboration."

I would note, Your Honor, that New GM cites both the Trusky and Castillo cases in their brief. Both the Trusky and Castillo cases had to do with contract interpretation, what

were assumed liabilities. And the issue there was whether or not the claims being pursued by those claimants fell within the four corners of the definition of Glove Box Warranty. And the plaintiffs in those cases tried to strain the language of the assumption of the Glove Box Warranty beyond the natural meaning of the words in the agreement, and they did not prevail.

New GM is trying to do the same thing here. They're trying to strain the words of Section 2.3(a)(9) to include an exclusion that is not in there. Everyone in this courtroom knows how to exclude punitive damages. You write the words "excluding punitive damages." That was not done.

Your Honor, we also believe that punitive damages are not a retained liability. It's a circular argument to say punitive damages are retained liability because retained liabilities, by definition, exclude assumed liabilities. So you're in a logic loop. But what you can do is look at the categories of excluded liabilities in the excluded liability -- in the retained -- I'm sorry, you could look at the category of retained liabilities in the retained liabilities section of the purchase agreement.

There are 16 categories, none of which are punitive damages. And any notion that punitive damages that would be independent claims as opposed to punitive damages that would be part of assumed liabilities are also retained liabilities makes no sense whatsoever, Your Honor.

There is no way that, I think, that this Court would have let it -- permitted this debtor to assume -- because if it's a retained liability, it's essentially assuming liability for New GM's post-sale conduct. There was no notice to anyone that any kind of assumption of liability on behalf of New GM was being undertaken when the Court approved the sale agreement. There is simply just no logical or sensible way to say that the post-closing misconduct of New GM could ever be a retained liability. In fact, the lead-in to the retained liability section says that they are liabilities of the seller. There is no basis to say that the liabilities of the buyer would ever become liabilities of the seller --

THE COURT: I'm having trouble keeping up with you on this aspect, Mr. Weintraub, because if I heard you right just now, you were saying that it would have been ready for me or anybody else to have Old GM assume liability for New GM conduct. I would think that even Mr. --

MR. WEINTRAUB: Steinberg?

THE COURT: -- Steinberg -- yeah, I know his name after this long -- would agree with that, but what you and he are arguing about isn't New GM's post-sale conduct, which you're ahead on in several respects, going back to April 15th. But where you and he are arguing is about whether New GM is liable not for its own conduct and its own knowledge, but pre-sale conduct by Old GM. That's the subset of the

intersecting circles that is encompassed by what you just said.

MR. WEINTRAUB: Well, and I apologize, Your Honor, because I was talking about both assumed liabilities and independent claims, and the first part of what I was talking about, maybe my transition was less than clear. The first part of what I was talking about would be we don't believe that punitive damages that we think are an assumed liability can be characterized as a retained liability. We think that that would be circular. Now, we're just talking about Old GM conduct. So we're talking about 2.3(a)(9), not independent claims.

And my argument for that is if you look at the construct of the retained liabilities section, it excludes assumed liabilities. So the argument that an assumed liability is a retained liability becomes circular, so the Court really has to address the issue head on. You can't state the result and say that punitive damages were not an assumed liability, therefore it's a retained liability, because we're arguing it was an assumed liability based upon the clear language of 2.3(a)(9).

And in support of that argument I made two points, one that the lead-in to retain liabilities expressly excludes assumed liabilities as a retained liability. The second point I made was if you look at the categories of what are retained liabilities, nowhere in those categories is there a category

for punitive damages. And this Court in I think it was Castillo said that it is informative to look at what was assumed to look at the categories of what were retained in the retained liabilities section. So picking up on Your Honor's point in Castillo, if you look at the 16 subparts of the retained liabilities section, nowhere does it say punitive damages. It would have been very easy to say that.

THE COURT: Didn't I decide Castillo on a parol evidence analysis after concluding that the agreement was ambiguous? It was the one that the settlement of the --

MR. WEINTRAUB: Yes, you may have done it. That was the settlement. That's right.

THE COURT: -- class action, wasn't it?

MR. WEINTRAUB: That's right. Maybe I'm getting --

THE COURT: And just confirming on -- affirmed in part on that, although he thought different aspects were ambiguous, if I'm not mistaken.

MR. WEINTRAUB: Right. And we would argue that this agreement is not ambiguous as to punitive damages and the integration clause would prevent any evidence of -- any parol evidence of -- to the contrary of what the plain language of the agreement states. Nowhere in the agreement, nowhere in the sale order is there any mention of commercially necessary obligations or assumption being limited to commercially necessary obligations, and that's a very dangerous, slippery

slope, Your Honor, because it becomes convenient and situational for parties to say what was commercially reasonable then, what was commercially reasonable now. It's not a creditable standard, especially in the context of this dispute. And arguments could be made on both sides as to why and what would be commercially reasonable, given the scrutiny that GM is under and given the public approbation, frankly, of its conduct here.

But we're not saying that we need to even get into what is commercially reasonable because it's not in the agreement -- commercially necessary. It's not in the agreement. It's not in the sale order. The agreement is unambiguous, in our view, and there's an integration clause.

Now, the second point I was making earlier with respect to retained liabilities -- and this is where maybe I didn't make a good transition -- is New GM also argues that any independent claims against New GM for its post-sale conduct, whether based upon inherited information or presumably even information developed without the benefit of inherited information, would also be a retained liability. And that's what I said would be nonsensical.

The notion that this agreement could be interpreted to say that New GM's post-sale conduct would give rise to retained liability, in my view, is essentially the same thing as saying Old GM assumed that liability because that liability

didn't exist on the closing date because New GM hadn't done anything yet. So if the argument is the actions and inactions that New GM took after the closing date created retained liabilities, that's the same thing as saying that the debtor agreed to assume those liabilities, and that was what I said made no sense, would be nonsensical, and there was no indication in the order or in any of the proceedings that that was going to be the case.

And if this Court was giving the equivalent of a prospective third-party release that would release New GM of any liability to people that had no connection with the case, these would be the future claimants, after the sale closes, there was absolutely no notice of that, and frankly that would likely be beyond the subject matter jurisdiction of any court, not just this court.

I think I've more or less in a haphazard way covered everything I wanted to cover. The Court had two questions for me concerning our supplemental letter, if I could just pull that out and take a look at that. You're asking about the last sentence in paragraph one?

THE COURT: Yeah, the part that says New GM can be the successor to Old GM if the bellwether plaintiffs' due process rights were violated at the time of the 363 sale.

MR. WEINTRAUB: I think I --

THE COURT: And they were prejudiced as a result,

which means the free and clear barrier to successor liability would not be applicable to those plaintiffs.

MR. WEINTRAUB: I think I addressed that, Your Honor, already.

THE COURT: Well, if you're talking about the person who's injured after 2012, I understand --

MR. WEINTRAUB: And --

THE COURT: -- what you're saying there.

MR. WEINTRAUB: And frankly, people -- remember I had the two categories, people who owned their vehicles at the time of the sale, and I argued that they were known creditors, they should have been given notice. New GM should have recalled those vehicles immediately after the sale. They did not. Those people were eventually injured. I said that they were prejudiced because they were not told at the time of the sale that they were riding in a vehicle that was defective, which greatly enhanced their odds of being -- having an accident and being injured. I said based upon that due process violation and the prejudice that they should not be --

THE COURT: Okay. You did explain that before, and if this is the same thing, you don't need to repeat it.

MR. WEINTRAUB: Yeah, same thing. Yeah.

THE COURT: And --

MR. WEINTRAUB: What was the other one, Your Honor?

THE COURT: -- in paragraph two, did you mean for

post-sale conduct or for something else?

MR. WEINTRAUB: In paragraph two?

THE COURT: Yeah.

MR. WEINTRAUB: No, I --

THE COURT: So if New GM has acted in a grossly negligent fashion, reckless fashion and willful fashion after the sale, I'm not sure why you preceded by, quote, "if punitive damages are an assumed liability." I would have thought that you would say that whatever New GM has done after the sale was fair game for you to argue.

MR. WEINTRAUB: I think that's right, but we're also saying that, consistent with the position we took with respect to assumed liabilities, that you look at with respect to assumed liabilities, you are looking at what Old GM's conduct was and the reprehensible nature of their conduct to the extent it contributed to the accident is fair game. The contact -- I'm sorry, the conduct triggering the liability is an element of whether punitive damages would be appropriate. This would be the concealment of the existence of the ignition switch defect, the due process violation in terms of not getting people appropriate notice.

Now, remember, again, we're talking about post-sale accident victims. So we're talking about Old GM's conduct up until the time of the sale and whether that reprehensible conduct is conduct that Old GM can be liable for punitive

damages for. If it is --

THE COURT: Ultimately, the issue is whether you can pile on to your post-sale allegedly wrongful conduct, pre-sale allegedly wrongful conduct.

MR. WEINTRAUB: I wouldn't consider it piling on, Your Honor, in the sense that these paths are not necessarily exclusive. What -- our view is what New GM assumed responsibility for would be Old GM's liability. A component of Old GM's liability would be punitive damages. Call it compensatory damages of $100 and punitive damages of $10, our argument is New GM assumed liability for $110. Independent of that, New GM may have been breach of duty to warn, be reckless, have been reckless, and that also could be culpable because remember these people were not injured until after the sale. So in terms of who had the last clear chance to warn these people that they were riding in a defective vehicle, it was New GM.

THE COURT: Okay.

MR. WEINTRAUB: I guess I would like to respond to whatever I heard next.

THE COURT: Yeah.

MR. WEINTRAUB: Thank you, Your Honor.

THE COURT: As usual. Mr. Weisfelner.

MR. WEISFELNER: Judge, good morning. And for the record, Edward Weisfelner, together with Howard Steel, at Brown

Rudnick, here with our co-counsel, Steven Berman, who's here in a dual capacity, both as co-lead counsel in the MDL as well as counsel representing the states of Arizona and California.

And, Your Honor, because of his relative newness in the bankruptcy proceedings, I'm going to answer the question that Your Honor posed to Mr. Berman about our position with regard to the brief that was primarily offered by and submitted by Mr. Weintraub on punitive damages first.

Your Honor, the reason why we joined the second part of the brief, as opposed to the first and second part of the brief, is first part of the brief really dealt with an argument that's unique to the post-sale accident victims, and that is that all of their claims, including any claims for punitive damages that may ultimately be established, were assumed liabilities consistent with their interpretation of the sale agreement, which we coincidentally happen to agree with, but it's not part of our argument. I hope that answers Your Honor's question --

THE COURT: Okay.

MR. WEISFELNER: -- as originally posed.

Your Honor, I just want to -- and I'm cognizant of Your Honor's admonition in the beginning that you want time spent on punitive damages as opposed to imputation. I am aware that Your Honor was troubled by the amount of background facts that are contained in the operative complaints, that being the

second amended consolidated complaint, as well as the states' actions, but I want to make one thing crystal clear at the very beginning of my comments, and that is that neither of those complaints seek to hold New GM liable for Old GM conduct, Old GM actions or Old GM's failure to act. Rather, those complaints seek to hold New GM, and only New GM, liable for its own independent acts and failures. Frankly, Your Honor, New GM's position, in our view, is simply a re-argument of positions that it's previously asserted before this Court and lost on and that it's currently on appeal with respect to before the Second Circuit.

Your Honor, I think it's worth identifying those portions of Your Honor's prior decisions that I think are binding. Your Honor noted that the economic loss plaintiffs were prejudiced in one respect. Nobody else had argued a point that they argue now, that the proposed sale order was overly broad and that it should have allowed them to assert claims involving old GM vehicles and parts, so long as they were basing their claims solely on New GM conduct and not based on any kind of successor liability or other act by Old GM.

In the Bledsoe decision, footnote 16, Your Honor held or determined that things New GM did or knowledge New GM personnel had when acting for New GM, even if those personnel acquired that knowledge while acting for Old GM, would be fair game and New GM would have to live with the knowledge its

personnel had from the earliest days they began to serve New GM.

Your Honor, I want to focus on two interrelated points that are all over New GM's arguments, both with respect to imputation, punitive damages. The first point it makes -- and this sort of goes to the markups that you were treated with and the various letters dealing with the markups, but it seems to me that you can boil down their first position to the following. Background facts, and I acknowledge there are a lot of them, dating back to 2000/2001 are somehow per se improper and represent a violation of the sale order, the decision, the judgment.

The second argument that GM makes throughout its papers is that our efforts to impute knowledge to New GM derived from some source, either from employees that switch from Old GM to New GM or from books and records. And I think it's important in the context of books and records to emphasize that this is a car manufacturer. It's not a widget manufacturer. It's not a zipper manufacturer. It's not even a radio manufacturer. It's a car manufacturer. And they're under a statutory federal duty to maintain certain books and records, and they're maintaining those books and records for specified purpose such that if they determine that there's a safety defect, they have five days, five days to report it and conduct a recall.

It was those books and records that New GM is charged with knowledge of, even if those records were originally kept by Old GM. Beyond that, we allege knowledge acquired by New GM post-sale. Well, somehow our efforts to impute knowledge -- not conduct knowledge -- from Old GM to New GM, we're being told is improper and somehow violates the sale order, the decision, the judgment, notwithstanding Your Honor's prior direction that the knowledge that New GM garnered from Old GM employees was fair game.

Now, I want you to keep those two contentions that I think suffuse all of GM's arguments that somehow imputing knowledge is inappropriate or talking about what happened before the sale in terms of knowledge as opposed to conduct is somehow improper. And I want you to keep those in mind, if at all possible, Your Honor, in the context of what New GM just admitted this past month in connection with this deferred prosecution agreement.

And, Your Honor, I know that the document was submitted as an exhibit to our reply brief, or I think it was actually our original brief on the imputation issues, but if it would assist the Court, I have a copy of the deferred prosecution agreement which I'd like to hand up because I think it'd be useful. May I?

THE COURT: Yeah.

MR. WEISFELNER: Your Honor, if we can find another

copy for the clerks, we'll get that done, as well.

Your Honor, if one were to turn to Count I of the deferred prosecution agreement, Count I is headed as scheme to conceal material facts from a government regulator. And what we see in the second paragraph of Count I -- and I'm going down to the bottom of the page -- we're told that from the earliest date relevant to this information -- now, the earliest date relative to this information could clearly predate the sale order, but I'm focused instead on the rest of the sentence, which goes on to read, "Until in or about the spring of 2013, way beyond the sale order, GM," which in this context can only mean New GM, "promoted the sale of" --

THE COURT: Timeout, Mr. Weisfelner. I'm --

MR. WEISFELNER: Sure.

THE COURT: -- losing you. I see a forfeiture complaint. Is the same or different?

MR. WEISFELNER: Your Honor, if you look at Exhibit B to the deferred prosecution agreement --

THE COURT: D, delta?

MR. WEISFELNER: B, boy. And in particular, if you look at what in my version is Page 17 of 52, looking at the top of the document. I don't know if you have the same designations in yours.

THE COURT: My problem is that my copy runs -- oh, I have it now, I think. Yes, okay.

MR. WEISFELNER: It's cited Information --

THE COURT: Right.

MR. WEISFELNER: -- 15-CR- --

THE COURT: Okay.

MR. WEISFELNER: And I'm --

THE COURT: And the paragraph to which you were making reference?

MR. WEISFELNER: Paragraph 2, at the very bottom of the page, the sentence reads, "And from the earliest date relevant to this information." And obviously, that would refer Your Honor to pre-sale order dates. But then it goes on to read, "Until in or about the spring of 2013." That obviously being post-sale. "GM promoted," now here we're talking about both old, but in particular, New GM, promoted sales of pre-owned, i.e., used cars, by GM dealerships nationwide.

In Paragraph 4, the information says, "From in or about the spring of 2012 to in or about February of 2014, GM," meaning New GM, "through its agents and employees, concealed a potentially deadly safety defect from NHTSA and the public." Now it goes down, skipping over the next sentence, "As GM knew by no later than 2005," that's obviously a reference to Old GM, "the defective switch was prone to too easy movement from their on accessory or off position. And as GM personnel well knew no later than the spring of 2012," they're talking about New GM, "when that movement occurred, the driver would lose not only

the assistance of power steering and power brakes, but also the protection afforded by the vehicle's frontal air bags in the event of a crash."

Now Your Honor, if you then peruse the rest of the information, and I'm going to skip over the next section, which is statutory allegations, other than to point out that what the government is complaining about, and this is in the period of 2012 to 2014, is that New GM, quote:

> "Willfully and knowingly did falsify, conceal, and cover up, by trick, scheme and device, material facts, and made materially false, fictitious and fraudulent statements and representations. To wit, GM engaged in a scheme to conceal from its federal U.S. regulator, NHTSA, a potentially deadly safety defect that GM was required to disclose within five business days of its discovery."

These are informations and facts that GM conceded as part of the deferred prosecution agreement. Count II for wire fraud, and I'll skip over the statutory allegations again, other than to note that in Paragraph 13 it's New GM admitting that it's defrauded U.S. consumers into purchasing its products by concealing information and making misleading statements about the safety of vehicles.

And Your Honor, perhaps even more importantly for the purposes of today's undertaking, where we're being criticized

for including a lot of background information about what Old GM knew, and then attempting to impute what Old GM knew to New GM. I think one needs to focus specifically on Exhibit C, the deferred prosecution agreement, beginning on Page 25 of 52. We have statement of facts and an overview.

Now, Your Honor, I think it's extremely interesting, if you start counting the paragraphs. Everything in the overview section, Paragraphs 1 through 11, everything in their regulatory framework, and GM's formal recall process, starting at Paragraph 12 and running through Paragraph 18, but in particular, starting at Paragraph 19, where we get the background, GM equipped cars with a defective switch. This is all pre-sale knowledge, or from the government's perspective, pre-sale conduct, Paragraphs 19, 20, 21, 22, 23, 24, 25, 26, 27, 28.

Then we get to the next section. GM, meaning Old GM, considers a fix, and we get a recitation of facts and circumstances, knowledge that Old GM had, that runs from Paragraph 29 through and including Paragraph 29. Then we're told about the changes to the switch and the key slot. Those allegations run from Paragraph 40 to 43. The defective switches' deadly consequences runs Paragraph 44 through and including Paragraph 56. It's not until Paragraph 67 that we start talking about New GM.

Your Honor, I recognize the difference between the

police and regulatory authorities and powers of the U.S. Attorney's Office, as compared to plaintiffs in prior litigation. But Your Honor, this is the same entity, non-debtor entity, that complains viciously about the extent to which we talk about what happened pre-sale. Not in terms of trying to hold New GM liable for Old GM conduct, but rather in order to elucidate what New GM knew, and when it knew it. We're criticized when our complaint goes through a lot of the background facts, and alleges Old GM knew, or New GM knew, based on Old GM employees or Old GM books and records. Well, it was good enough for the U.S. Attorney to go through those background facts in a deferred prosecution agreement, but it's somehow improper for us to do it as part of a complaint.

New GM acknowledges that the background facts are relevant to a claim against New GM in connection with a forfeiture of nearly a billion dollars, on account of New GM's liability for a scheme to conceal and defraud, but it doesn't concede that those background facts are appropriate in our complaint.

Nowhere in this deferred prosecution agreement does GM take a position on the impropriety of imputing to New GM the knowledge of Old GM employees. And throughout its papers, what it tells you is you can't do a wholesale imputation, and it's like there's some wacko case named Weisfelner v. Fund 1 that I seem to know a little bit about, but I don't think it's

relevant. They say there's no automatic imputation. They don't talk about automatic imputation when they enter into the deferred prosecution agreement, and they don't do it because they acknowledge throughout the course of this document exactly which Old GM employees had what knowledge in connection with these issues. So we're told in Paragraph 70 that it was the PI senior managers' knowledge that is important, both derived while he was working for New GM, and while he was working for Old GM's Safety Attorney. And these are all capital or defined terms, they use the office as opposed to the name of the individual.

But we're told that a GM Safety Attorney consulted with a GM vice-president to act as an executive champion in order to propel the matter of the defective ignition switch forward. We are told about a GM electrical engineer, or GM Safety Director, or PI's Senior Manager. And Your Honor will note that in our papers, we name very many of these people by name, especially in the sealed portion of our brief. And it goes on and on, to talk about a GM Safety Attorney, and an airbag FDA engineer.

GM didn't say to the U.S. Attorney, well, wait a second, you can't determine this individual's knowledge based on what he used to do at Old GM, that would be improper; we're going to take you to bankruptcy court and take the position that your imputation of knowledge is somehow inappropriate.

They didn't do that with the U.S. Attorney under fear of criminal prosecution in order to get a $900 million deferred prosecution agreement, and they shouldn't be allowed to do it here.

And again, I think it's terribly important to remember that we are talking about a car manufacturer, and at times, the largest car manufacturer in the world. Car manufacturers have a statutory obligation to maintain certain books and records consistent with their --

THE COURT: Mr. Weisfelner, I got these points the first two times you made them.

MR. WEISFELNER: My point being that, when you have a trade database, which New GM was required to maintain up until the time that it got sold, and New GM is obligated to retain, maintain, and continue to add to the trade database and its field performance evaluation reports, documents that have to be maintained on a daily basis, consistent with statutory authority. The employees that manage those databases and those records can't have wiped them clean or burned them up on the day that they became New GM employees. In fact, they were obligated to maintain and continue to update those records for one purpose and one purpose only, and that was to identify safety defects.

And I -- Your Honor, the reason why I harp on this point is I think, to a very large extent, acknowledging GM's

obligations as a car manufacturer with regard to what books and records it was required to maintain, and the fact that old employees became new employees, in particular the 24 critical mass of employees that Your Honor's previously identified, I think elevates this beyond the policy issues that GM keeps harping on in terms of 363 sales. We acknowledge and agree with the proposition that except in extraordinary circumstances, you can't eviscerate free and clear orders, because it puts the bankruptcy court and the parties out of business in terms of trying to obtain value in a necessary sale.

We don't want to eviscerate the free and clear provision, except as it relates to the issues that we have pending on appeal. But what we do want, consistent with Second Circuit authority under Manville III and its progeny, is, New GM is not entitled to a get-out-of-jail-free card with respect to its own independent post-sale acts and failures to act, and that's what the second amended consolidated complaint and the state actions seek.

New GM had an independent legal obligation to recall these cars, which it didn't do for years. We think it didn't do it for years from 2009 forward. They have now admitted that at least as soon as 2012 they had an obligation to recall, which they failed to do, purposefully failed to do. New GM had a legal obligation to correct misleading statements regarding

the safety of the subject vehicles. New GM had that obligation. New GM failed to correct the record with regard to its prior misleading statements regarding the safety of these vehicles that New GM published. And we believe that New GM's conduct gives rise to claims under various consumer protection statutes for its acts, failures, deception, and as the information suggests, defrauding consumers.

Your Honor, the fact of the matter is, New GM didn't like this Court's decision with regard to independent claims and has appealed that much of Your Honor's ruling to the Second Circuit. Now it seems to us it just wants to re-litigate that same issue and those same findings. There is no notion of a consent or an acknowledgment by New GM that there's any such thing as an independent claim pled in the volume of material that consists of the second amended consolidated complaint, or the two states' complaints. Rather, they said any effort to articulate an independent claim has been destroyed because we make reference to Old GM, either contextually, or to demonstrate knowledge acquired by Old GM employees that they retained when they became New GM employees. Not by some fancy, automatic imputation, but by specific individuals named in the information and it's been named in our pleadings.

And Your Honor, that sort of puts aside the issue of whether or not -- there's two points. Can we prove imputation to the extent necessary to prevail? That, I think as Your

Honor recognizes, is up to the courts adjudicating those complaints. The gatekeeping function, and it's an important function, is whether we're allowed to make the allegation, and in making the allegation of imputation, somehow we've destroyed the independent nature of our independent claims.

Your Honor, I acknowledge again that we've gotten a little bit far afield of punitive damages, and I know that that was Your Honor's focus. It is our contention that if you start with an appropriate, independent claim, a claim by a non-debtor against a non-debtor that deals exclusively with the misconduct of the non-debtor, and doesn't rely on or incorporate the misconduct of the debtor in possession, the settlement, that we are entitled to punitive damages if a court competent in jurisdiction determines we are, which as Mr. Weintraub correctly indicated, first requires that you're entitled to compensatory damages. Without the former, compensatory, there is no punitive.

And I think to the extent that the debtor is looking for a merit-based finding, it's inappropriate, but it would be inappropriate for us to be looking for a merits based finding, either on the level of punitive damages, or on the level of imputation, or at the level of are we entitled to refer to Old GM's knowledge as opposed to Old GM's conduct. What I could never understand is why we have gone through this process of marked pleadings, color-coded, and the arguments that ensued.

I don't know why it wouldn't have been sufficient for this Court, as a gatekeeper, to address itself to all other courts of competent jurisdiction, or for that matter, the parties adjudicating matters before other courts, and indicate that a trier of fact would be obligated to get an appropriate charge. And that is that you can't find New GM liable for pre-sale conduct of Old GM. We agreed with that, subject to our rights on the field.

Liability against New GM must be based on the acts or failures to act by New GM that violated the duty to the plaintiff and caused damages. That's what the trier of fact would be asked to do. And frankly, Your Honor, we see nothing in our pleadings that crosses the line and seeks to find New GM liable for Old GM acts. And Your Honor, unless you've got any questions for me, I will tell you that, you know, we've looked through the cases that were cited by New GM, in particular, Judge Bernstein's decision in Burton, which doesn't contain the phrase "imputation" anywhere in it. That New GM argues is its leading case on the claims and causative action that we've asserted.

Your Honor will recall that Judge Bernstein's decision in Burton was fundamentally a due process issue, where the plaintiffs in that action were seeking to confine themselves, or put themselves into a Grumman Olson category, the claim that their due process rights were violated, and as a

consequence, the sale order and Chrysler ought not bar their pursuit of claims. And what Judge Bernstein found was, you don't fall in the rubric of Grumman Olsen as a future claimant, in part because there were multiple technical services bulletins issued with respect to -- that was a fuel spit-back problem, if I recall. And as a consequence, the plaintiffs were contingent claimants and should have filed claims and were otherwise not deprived of due process.

Again, the case is being cited as rejecting a duty to warn. But Your Honor, Judge Bernstein goes on extensively to talk about situations in which a duty to warn would exist. And perhaps it's worthwhile quoting from Burton on the duty to warn because it's so heavily relied on by my adversaries.

What the Court said is, first of all, that the sales order does not bar claims concerning vehicles manufactured or sold by New GM -- I'm sorry, by New Chrysler after the closing, for injuries resulting from the breach of any duties that arose under non-bankruptcy law after the closing. The Court leaves the determination of the legal sufficiency of those claims to the trial court. In that case, it was a Delaware court.

On the duty to warn, what the judge indicated was that the duty to warn raises a more difficult quest. New Chrysler did not assume Old Parko's (phonetic) duty to warn its customers about the fuel spit-back problem, and any claim based on the breach of Old Parko's duty to warn is barred by the sale

order. Well, again, we're not talking about Old GM's duty to warn, we're talking about New GM's duty to warn. Judge Bernstein goes on to say, nevertheless, the law may impose a second duty to warn on New Chrysler. Here, New Chrysler purchased Old Parko's assets.

> "While succession alone does not impose duty to warn or predecess its customers of preexisting defects, but a duty may arise where the successor succeeds to the predecessive service contracts that cover the machine, actually services the machine, is aware of the defect, and knows the location of the machines' owner. In these circumstances, the law imposes a duty to warn, because the successor has entered into a relationship with the customer and derives an actual or potential economic benefit."

Beyond that, Judge Bernstein noticed that a plaintiff who suffers a personal injury because someone failed to warn him about a dangerous product, and the failure to warn proximately caused a substantive injury, that there is a resulting duty to warn. And while my adversaries sought to rely on this Old Chrysler case, they failed to call Your Honor's attention to the subsequent decision in the Holland case that was decided in the Northern District of Ohio. And in that case, Your Honor, the issue before the court was again the plaintiff's ability to pursue claims against the buyer in the

sale. The judge cited to and distinguished Burton to the extent necessary, but then followed Burton for the proposition that the sale order did not prevent New Chrysler from assuming obligations that it did not have, such as extending lifetime warranty to repair or replace the defective fuel assembly.

Plaintiffs raised claims for failure to warn, failure to address defect, negligent misrepresentation, and fraud. An important component of plaintiff's case is the fact that, in essence, New Chrysler issued TSVs regarding the rusting on the Chrysler Pacificas. They acknowledged there was an issue, they limited warranty coverage to only a small portion of the vehicles. As explained in Burton, such claims cannot be barred by the sale order, and under the same logic, citing to their leading case, there's nothing about our independent claims that are somehow converted into being inappropriate claims in violation of either the sale order or Your Honor's decision and judgment as a consequence.

Your Honor, I can go on and distinguish each and every one of the other cases that has been cited, in particular, the Conmar Products Corp. v. Universal, the zipper case. We believe it was woefully mis-cited as standing for the proposition that a buyer is not liable for the trade secret violation, or a trade secret violation, despite knowledge of an employee regarding that trade secret hired from the seller. That wasn't Judge Hand's ruling at all. Judge Hand pointed out

that there was no obligation of the employee to disclose the fact that there was a trade secret, or that the trade secret was a subject of a separate confidentiality agreement. That there was nothing customary in those sorts of transactions to require secrecy contracts from factory workers.

That's not our case. Our case involves a whole bunch of very senior level Old GM employees that became New GM employees, continued to act in their same scope of authority and conduct, who had a statutory federal law obligation to bring issues that it carried over from Old GM, or realized anew at New GM, and report them, and they didn't.

Likewise, Nassimi doesn't support their proposition. Nassimi tried to defend against fraud in a sale of its business to Chamberlain, and Chamberlain sought recision. Nassimi argued waiver, along the line of laches, on the theory that you've known about this fraud by imputation since you've hired one of my prior employees who knew all about the fraud. And what the Court said in that case is, we're not going to allow Nassimi, who's guilty of fraud, to argue waiver because one of his former employees who knew about the fraud didn't tell the new employee about the fraud, because it wasn't part of his business, and because we weren't going to allow Nassimi to use his ex-employee's knowledge of the fraud to avoid recision.

Again, it doesn't stand for the proposition that it was cited for. This individual had no reason to disclose the

fraud, no duty to disclose the fraud. Not our case at all. And Your Honor, I'm sure you've read, and I don't need to go through unless you have any questions about it, the KCP&L case where KCP&L sold the business to IPC. The issue is whether or not there were tar pits that were known or disclosed, and whether or not there was an indemnity obligation that flowed.

And there again, the court in dealing with imputation issues said that, quote, "the seller and IPC knew that it was taking on liability for coal tar pits." And what the Court said was, no, read the contract. And the fact that one of the employees that used to work for the seller came to work for the buyer, and knew about these coal tar pits is not determinative, because again, you have to focus on whether or not that individual had a duty to disclose to its new employee, and whether the knowledge of the tar pits had to be disclosed, or has knowledge that it had within the scope of its employment with the new employer such that you could impute knowledge from the agent to its principal.

Your Honor, I fear that I've taken up more time than Your Honor was prepared to give to these issues, so unless Your Honor has any questions, I would just end by going back to the beginning. Section 6.15 of the sale agreement. New GM agreed to abide by all of the Safety Act obligations with respect to vehicles and parts manufactured by Old GM. It is admitted knowledge of the defect, it's admitted it concealed that

knowledge, it's admitted that it made false and misleading statements to the public. New GM's knowledge, regardless of the source of that knowledge, is what puts it in the scope of liability. That's an independent claim. And Your Honor, unless you have any questions, I have no further comment.

THE COURT: No, I don't.

All right. Mr. Steinberg, they went way beyond what I had envisioned. Can you give me a time before you go right up?

MR. STEINBERG: Your Honor, if I could just have five minutes? If I might --

THE COURT: You've got five minutes. We'll resume at 11:25 on the clock up there. We're in recess.

(Recess taken at 11:16 a.m.)

(Proceedings resume at 11:27 a.m.)

THE COURT: Mr. Steinberg, whenever you're ready.

MR. STEINBERG: Good morning, Your Honor. I want to talk about first the punitive damages you've claimed to sort of highlight that it comes up, as Mr. Weintraub said, in three ways. I want to spend my first time talking about punitive damages in the context of the liability, product liability was assumed under section 2.389 of the sale agreement.

The three ways, just to put it on the table, is whether this was an assumed liability, meaning whether we assumed punitive damages under Section 2.389.

The second way that Mr. Weintraub said it comes up, he framed it as in terms of independent claims. We frame it as whether there was an independent claim, or retained liability. I think they will concede that if it was a retained liability, they're not entitled to punitive damages. So the issue in that second context is whether the claims that they're asserting are retained liabilities versus independent claims.

And then the third, which is a relatively small category, is that to the extent that we recognize that there's an independent claim, if the basis upon which they will seek punitive damages in that case was based on Old GM conduct, well, that's just another form of successor liability claim.

But Your Honor I think wants me to talk about section 2.389, and whether we believe that that section provides for an assumption of punitive damages, and that's where I'd like to turn to now. And Your Honor was correct, and I don't think that they really quarrel with this, is that even under contract interpretation law, you'd have to look at the entire integrated agreement, and terms must be read consistently and harmoniously.

And in this particular case, where the contract was amended to address a specific objection raised to the Court, you need to look at the section and the context of the objection that was raised. And the relevant section of 2.389 can't be viewed in isolation. It needs to be construed in the

context of that entire sale agreement, and the objections made to the sale motion.

Now, some of this, Your Honor, I know that you know, but I think it helps frame the argument that at the time of the 363 sale, there were 70 million vehicles, or Old GM vehicles, on the road. And they have a divide, who is responsible for the vehicles that had been sold by Old GM? And the purpose of the assumed liabilities, retained liabilities section of the sale agreement was to divide up that responsibility. And so the general rule, as Your Honor had recognized, is that retained -- everything was a retained liability, unless it was listed as an assumed liability.

Retained liabilities was the catch-all. Retained liabilities in Section 2.3, had a list of 16 potential retained liabilities, but it wasn't clearly set forth as not being an exclusive list. And the retained liabilities section says that a retained liability that accrues or may, in effect, arise after the closing of the sale, is still going to be retained liability. The thrust of the agreement was that New GM was going to be responsible for assumed liabilities, and everything else was Old GM. If it was Old GM's responsibility, by definition, it could not be New GM's liability.

And that, I think, is the context that you have to look at section 2.389. Because when the sale agreement was filed, the only responsibility that New GM had on the diversion

that was filed with the sale agreement was to assume, effectively, the glove box warranty, which was not a damage claim, it was a repair-type obligation for a limited duration. There were objections that were filed to the sale motion based on that, as it relates to Old GM vehicle owners, there were two things that were added. One was the lemon law claims, which no one is quarreling about is effective here, and the second was the product liability section, Section 2.389.

Now, when you look at Section 2.389, you have to look at it in the context of what was originally filed under Section 2.389, and how the section had changed. And Your Honor, I had given my opponents a one-page sheet, which I'd like to hand up to Your Honor, before the hearing, which just highlights what the 2.389 looked at when the sale motion was filed, and then what the final version was of 2.389 as approved by Your Honor, just so you can have the language in front of you as I go through the language. So if it's okay, if I may approach?

THE COURT: Yes.

MR. STEINBERG: Now, the first thing I'd like to point out is I want to focus on the final approved version of Section 2.389. And I want to point out that on the word "liabilities." And if you notice, Your Honor, and I think my adversary would like to use the word "all liabilities." If you actually go to the sale agreement, most of the retained liabilities start off with all liabilities as well, too. Most

of the assumed liabilities start off all liabilities as well.

But liabilities, in the final version, is not a stand-alone term. That is, it's a term that was used as part of the overall definition of product liabilities, and that's what Section 2.389 is about. And if you look at what was the original version of 2.389 versus the final version, you see the addition of the words "caused by the motor vehicle."

THE COURT: That being the bold, italicized --

MR. STEINBERG: That's correct.

THE COURT: -- language in that middle paragraph?

MR. STEINBERG: That's correct. And so that -- there was a purposeful change. Now, understand that the original version was intended for something different than what the final version was. The original version said that with regard to a vehicle that New GM sold after proposing you would have these -- and got into an accident, there would be a product liability claim. And the purpose of the amendment was to now pick up liabilities for New GM with respect to vehicles sold by Old GM prior to the sale, so it's trying to cover something different.

It was a much broader concept, and therefore when someone defined product liabilities, they changed the definition by inserting different words because they didn't want to assume anything that someone could throw at them for a product liability accident. They want to confine it to damages

relating to the accident itself. And so you see the language that was added of "caused by the motor vehicle," which is different.

The next words that were different were the words "directly." Now Your Honor will see that the language of 2.389 is somewhat cumbersome, cumbersome in that the phrase caused by -- that the phrase "arising directly out of death, personal injury, or other injury to the persons or damaged the property" is repeated twice in the agreement. It's repeated first in the context of the definition of product liability, and then after you're outside the definition of product liability, they're repeated again. And the only reason to repeat it again, because the word "directly" is not there before, it's a modification because you needed to add the word "directly." And "directly" was a word of limitation.

It was to limit the injury that it had to be direct. It had to be caused by the motor vehicle, and it had to be direct. That language has to be given a purpose and a meaning. The word was inserted to imply something that was limiting what the overall definition of product liabilities were. And that has to be read also in a context of the other words that were added into the agreement, and those other words were "arising from the motor vehicle's performance" and "directly caused by the accident," "caused by the accident."

Now, my adversary talks about it in terms of, you

know, causally connected, Your Honor, and uses that word, the "causally connected." But causally connected to an accident is different than caused by the accident, caused by the defect. And my adversary says, no, cars don't cause -- you don't sue cars, you sue people. Well, that's true. I agree with that. You sue people, you sue -- here, you sue the person for the claim that he agreed to assume, which is limited by the words of 2.389, because of the word "directly caused by accidents."

When you read the section together, it reads that an assumed product liability claim is limited to the circumstance when an injury to be compensated is, A, directly caused by the motor vehicle; B, directly caused by the accident; and C, directly arises from the motor vehicle's performance. And that's the essence of compensatory damages, and not punitive damages, which are discretionary and designed to punish reprehensible conduct of the wrongdoer, and to deter future violations by the wrongdoer.

Now, the interpretation of 2.389 must be made within the context of why the section was amended. The language that was there was to pick up for a particular objection that was made by the Creditors Committee and the States Attorney Generals, including the States Attorney Generals of Arizona and California, and no one suggested in their objections that they should assume the word "assume punitive damages." It was to make people whole for the injuries that they suffered, and

punitive damages are a windfall to the plaintiff. They bring it as sort of a private attorney general, but it's a windfall. And once you've got your compensatory damages, you've been made whole.

Now, the plaintiffs make a lot to the argument that the word "punitive damages" is not in section 2.389. That's true. I don't know where you go from that, both sides are arguing the opposite inference, right? We argue that if you wanted us to assume punitive damages, you know how to write that. You didn't put it in, and then we assert that the contract interpretation that assumed liabilities with the exception to the general rule, so if you didn't expressly provide for the exception, then the general rule would apply.

They opt -- they argue the opposite inference, and the best that you can say is that when you don't have the outcome-determinative term "punitive damages" in what we're arguing about here, you have ambiguity. It's hard to argue that something is unambiguous when the provision doesn't address it one way or another. So they say that you don't have the word "damages" there. But you know what? The word "liability" is the defined term, that broad term liabilities? That doesn't have the word "damages," either.

Section 2.389 actually does have "damages" in there. Not capital "D," lower "d." What's the term the damage is used for? It's damage by property, property damage. So did we --

do we take our position that because they referenced the word "damage" and it's just property damage, that that's the limit of our liability? That's not what they said. So you have an ambiguity here, because the words "punitive damages" were not included. But the language of limitation that were put in subsume punitive damages.

The language of limitation was directed not only to eliminate punitive damages, but to eliminate those types of product -- those types of causes of action that are sometimes brought in connection with a -- an accident case that aren't related specifically to the accident. And if you look at the original definition of "product liabilities" under the first version, there's a parenthetical there: Negligence, strict liability, design defect, manufacturing defect, failure to warn, breach of the express implied warranties and merchant ability, or fitness for particular purpose. Duty to warn there being the duty to warn at the time of the vehicle sale.

That is what New GM believed that they were assuming. They didn't repeat the litany when we got the final version, because they had to address something broader than that. They wanted to eliminate consumer action type claims, false advertising claims, they wanted to eliminate fraud type claims, and therefore, they put in those words of limitation that narrow what was actually assumed, and those words of limitation subsume the prohibition on the assumption of punitive damages.

THE COURT: I'm having a little trouble following the latter argument. If New GM didn't want to be held liable for false advertising, by way of example, that would seem to be covered by both the old and the new language. No, because the old language still said to third parties for death, personal injury, or other injury to persons, or damage to property. And the new language talks about directly out of death, personal injury, or other injury to persons, or damage to property caused by accidents or incidents, and arising from such motor vehicle's operation or performance. It seems to me to be saying the same thing in different ways.

MR. STEINBERG: Except that --

THE COURT: And in each case, if you were closing something like false advertising.

MR. STEINBERG: Well, Your Honor, I think that in the first case, the original version, that if New GM was the one that sold the vehicle, that -- and there was an accident, I'm not sure what they were precluding. It says "including liabilities for" and it doesn't specifically take that away. And this relates to when, in fact, the New GM conduct action after the sale, where New GM actually sold the vehicle. So it's not particularly clear whether they were carving that out, but when they got to the final version, they knew they had to carve it out, and that's what they did here.

We said that there's -- we also argued in our papers

that there's an overarching reason why there was not an assignment of punitive damages, and that's because New York law that applies to the sale agreement does not provide for the assignment of punitive damages. And we cited two cases that established there have been fairly well recognized law that punitive damages are a form of retribution for reprehensible conduct towards the plaintiff, and as a matter of public policy, that exposure to reprehensible conduct and the need to punish the wrongdoer itself cannot be offloaded by the alleged wrongdoer. And we cited to Fabiano v. Philip Morris, 54 AD 3d 985 (2008); Home Insurance v. American Home Products, 75 N.Y.2d 196; Soto v. State Farm, 83 N.Y.2d 718.

They all stand for the proposition that you can insure for punitive damages, but an insured can't look to its insurance company to indemnify them because the purpose of punitive damages is to allow -- is to punish the wrongdoer and deter them from acting again, and allowing coverage that serves no useful purpose, since damages are a windfall for the plaintiff. That's the way that the language is written. And in Soto, they said, punitive damages are intended to punish and deter. Its goal is condemnation and retribution, and that goal cannot be reconciled with allowing the wrongdoer to avert the economic punishment, you know. So you couldn't assign the punitive damage claim anyway, as a matter of public policy.

Old GM did something wrong, and Old GM was

responsible for its actions, and if that were egregious that it required a punishment and to deter Old GM from acting again, that liability remained with Old GM.

There's another contractual interpretation principle that we cite in our papers, which is that when there is a requirement to assume a -- when there is a contractual obligation to assume a liability, and it's not typically assumed, then the failure to specifically identify that liability as being assumed means that it wasn't assumed. And so we try to give Your Honor some analogous cases in the indemnity context and the guaranteed context and the subordination context, where people said that unless you were explicit as to the assumption of an obligation, you have not assumed the obligation.

And most, Your Honor, we think that when you go through this all, you're back where I think Your Honor had said, which is that you have an ambiguous position, not unambiguous like the plaintiffs have argued, and that you need to resort to the extrinsic evidence. And when you get to the extrinsic evidence, I think it's clear that they lose. Punitive damages don't serve any compensatory goals, they're a windfall for the plaintiffs, and they're not property rights. We cited the Erquist (phonetic) case, which says that compensatory damages are a property right, entitled to due process protection, but punitive damages are not. They are

discretionary moral judgments, and a plaintiff's expectation to receipt of punitives is too speculative to constitute property under the takings clause.

And when you need compensatory damages to get to punitive damages, that doesn't mean that punitive damages aren't a separate concept. Plaintiffs argued that they're inextricably linked, and that's true, in the -- to the extent that you don't get to punitives unless there was compensatory. But that doesn't mean that punitives are not a totally separate category, and when Mr. Weintraub said that the converse is true, one of the few things that I remember from my high school geometry is that the converse is not always true, and it's not true in this case. You needed to have to specifically assume the liability or not. Punitive damages were separate. The cases say in order to have punitive damages, you need to show pervasive and grave misconduct affecting the public in general. In the Fabiano case, punitive damage claims, when asserted in the context of a personal injury actions, do not essentially relate to the individual injury, which is our argument.

Punitive damages, while they are somewhat connected, they're not caused by. These are not situations -- when you go to the New York -- the standard form of New York jury instructions, which we also cited in our papers, they consider the wrongdoer's similar conduct in other situations. That's irrelevant to compensating someone for damages on a specific

accident. And they also look to the wrongdoer's financial condition in determining the level of punitive damages. That also is irrelevant to compensating somebody for injury caused by a particular accident.

And when Mr. Weintraub says that calling someone a successor is the same thing as saying that their liability was assumed, that's clearly wrong. New GM is not the successor to Old GM under any of the tests, and the Court found that way. Clearly, we assume the liability of whatever it was that was in the sale agreement, and that was what we assumed. But that doesn't mean he can -- they can write complaints that say things like, New GM is the successor to Old GM. They can't write complaints like they've done in the Bellwether cases that say that New GM manufactured a 2005 vehicle. That's just wrong.

And when Mr. Weisfelner and Mr. Weintraub talked about the imputation doctrine, which I'll get to in a couple of minutes, the references to give what happened with Old GM, for purposes of background, I think Your Honor said is relevant, and you could do it in certain instances. But Your Honor has actually ruled on this subject. You can't do it in the way that they've done it, because the way they're trying to do it is to essentially assert a successor liability claim without calling it that. And that is inappropriate.

Tying back to the assumption of product liability

claims, the two elements of why you have punitive damages, punishment and deterrence. On punishment, the sale order says the New GM is not responsible for Old GM conduct. And I think I tried to understand what Mr. Weintraub was saying, and let me see if I can repackage it to what I was saying, not what he thought I was saying.

If Old GM did something wrong that was a retained liability, that didn't become a liability of the New GM. New GM is responsible for its own conduct, and if there was a liability that New GM had that was not otherwise cut off by the free-in-sale aspects of the sale order, New GM is responsible for that conduct. New GM is not asking Old GM to be responsible for its cut. And what they -- the contortion that he had to get to that conclusion made no sense to me. But to say it again, Old GM conduct cannot be a source of a New GM liability if the order cut off that type of liability. It was an Old GM liability, based on Old GM conduct. The sale free and clear meant that New GM didn't take that liability on unless it was an assumed liability. And New GM is responsible for its own legal duties, and Your Honor in Bledsoe was correct, that if New GM knowingly installed the defective product, this defective part in a vehicle, even if it was an Old GM vehicle, that would be a claim that they could assert against New GM.

And I think, Your Honor, just to take it off the

table, I think as part of your gatekeeping function, we would say certified pre-owned. Certified pre-owned vehicles, where the vehicle was sold used after the sale, but came with a New GM warranty, limited warranty, we're taking that off the table. We recognize that that is an independent claim, for whatever it's worth. We do say in our papers, and you can see it from the deferred prosecution agreement that at least as -- insofar as the ignition switch, the defective ignition switch, was probably about 800 total of the vehicles that have fit with them in the certified pre-owned category. But whatever it is, it's more or it's less, that is -- we do take that as on its responsibility.

But there needs to be a volitional act, a new volitional act, that New GM takes on that creates the liability. It can't be because there was an inherited duty that was otherwise cut off by the sale order. And that's where we go to Your Honor on the gatekeeping function, and the significance of the quantitative action that have been asserted against New GM with respect to Old GM vehicles. The sale order cut off responsibilities for that, except for assumed liabilities. Your Honor had said, in your April 15th decision, that if they can assert an independent claim that would otherwise be barred by the sale order, but is based on New GM conduct only, they should be able to assert.

So one of the things that we tried to do in our

papers, through the marked pleadings and through our letters and through our no-strike pleading, was to challenge them on that. Look at the particular causes of action in the MDL complaint that they're asserting, and tell me which one of those are the independent claims that they're allowed to pursue. Now, I think Mr. Weisfelner said that the whole of -- they're saying the whole MDL complaint can't go forward, and while we may have said that they improperly pled and didn't listen to Your Honor's instructions before, we recognize that both the state's causes of action and the MDL complaint have situations which relate to New GM vehicles sold by New GM. And we haven't come to Your Honor to try to parse that.

What we argued for, Your Honor, is with respect to Old GM sold vehicles prior to the sale, and Old GM vehicles which were sold after the sale by third parties who were unrelated to New GM. We're saying that those, that category of parties, can't sue New GM unless there's a new independent duty that we took on. And that new independent duty has to be a volitional act, it can't be something that we inherited from Old GM, because the purpose of the free-and-clear order was not to have those in actions, and the Holland case that Mr. Weisfelner referred to, the thrust of that case was the fact that old -- New Chrysler had extended warranties. And that was the linchpin for them to assert an independent claim.

They actually conceded that they didn't have claims

against the New Chrysler for liabilities, except for new volitional acts. And the judge, who at that point was exercising the gatekeeping function that perhaps the bankruptcy court should have exercised, because he was not transferring the case to the bankruptcy court, the judge said, well, I think there's enough here to have independent claims asserted.

It so happens, if you look at the document in the Holland case, by the way, Your Honor, is that the day -- within a week of --

THE COURT: Which document? The complaint in Holland?

MR. STEINBERG: The Holland complaint. I'm sorry, Your Honor?

THE COURT: No, you said if you look at the document in Holland. Were you referring to the complaint in Holland, or something else?

MR. STEINBERG: Talking about the docket sheet in Holland. You'll see that shortly after that was filed, New Chrysler made a motion for judgment on the pleadings, which has not been argued. But they immediately said to the judge, there's nothing there that has been asserted that there's a new volitional act. And your whole decision was based on the -- whether New Chrysler had a sufficient relationship with the Old Chrysler vehicle owner, based on something that New Chrysler did. And so they went to attack that particular finding. But

there's nothing here that is being alleged against us, New GM, in this context of a volitional act. It's all predicated on the recall covenant, and the failure to comply with the recall covenant.

The policy objectives, going back to punitive damages -- and I took myself on my own tangent. The policy objectives on punitive damages are not met. Punitive damages are subordinated in bankruptcy, and based on the sale price that New GM was paying, Old GM was clearly going to be insolvent, and punitive damages would never have been awarded. New GM would never have assumed a claim that Old GM would never have been required to pay.

And that's not speculation, as said by my adversaries in their papers. That was known at the time of the sale. They were going to have a finite recovery, it was going to be insolvent, and that new -- Old GM remained insolvent after the sale, and there was not going to be any payment on subordinated claims.

The Creditors' Committee who objected to 2.389 were going to be the future equityholders of New GM. They had an economic interest to make sure that New GM would have value in their shares. They never would have agreed to an open-ended assumption of punitive damages, which could theoretically affect the equity that they were going to get. And they certainly wouldn't have done it if it was a reversal of the

priorities that the Bankruptcy Code gives them, because they were ahead of subordinated claims, and if punitive damages were being assumed, they would have leapfrogged ahead of the unsecured creditors, and they never would have tolerated that, as well.

And then on the deterrence factor, it's clear, Old GM was out of business after the 363 sale, so there's no objective served by assuming these liabilities. So to sum up on the assumption point, punitive damages have a specific purpose. It is to punish and to deter conduct. It is not tied to compensating the victim, it's a windfall to the victim. When this section was amended, it was specifically amended to address how to compensate someone who may get into an accident in the future. It wasn't meant to have an open-ended windfall go to people, and no one took that obligation on, and the language that they put in 2.389, which is different than what the original version was, was to limit that. I think the --

THE COURT: I thought an element of the assumption was that with New GM continuing in business, it was commercially necessary to give auto owners, the 70 million you talked about on the road, comfort that if they later got hurt, somebody wouldn't be saying, well, your car was manufactured by Old GM, and therefore you had a contingent claim and you didn't file a proof of claim against Old GM, you were out of luck. And to deal with the tension that you have in products

liability cases, that some of the acts that result in the cause of action may take place prior to the petition, and other acts may take place -- and the injury may result after the petition.

Do you think I should divorce that understanding from my analysis or do you think that's part of this one?

MF. STEINBERG: I think it is part of it. I think when I said to Your Honor you need to understand the context of why the amendment was made, it happened in front of you and that this was the language that emerged from that and the reasons why people told you this was happening, I think you have to consider it.

And I actually don't disagree with a lot of what you said, Your Honor, which is that there was the concern about the due process future creditor issue that was raised as part of the sale. No one wanted to have the sale bogged down. There was an urgency to close this within a specific period of time.

This was an important issue that had been raised, and it was an issue that they took off the table. But they took it off the table to pay for compensatory damages. They didn't -- there's nothing that's a property right for punitive damages. They weren't trying to do punitive damages, and no one has raised anything to suggest that this was on the table and they said we should assume it. I mean, there's no one who said that punitive damages was raised as an issue. Everything that was raised was in the context of compensatory damages.

I mean, what I've tried to articulate to you is that if the creditors committee went to try to put a priority ahead of them, they wouldn't sit there -- Old GM wanted to have necessarily a claim that they never were going to pay be paid by us. The creditors wouldn't want our equity affected by that and they wouldn't want to have a reversal of priorities.

And there was no basis to punish New GM. And remember, New GM is the government-sponsored entity that was bailing out the auto industry at the height of the industry at a time when the economy needed that type of action, but it was the government. The government wasn't going to sit there and take punitive damages on. They wouldn't take pre-sale accident claims on.

That was one of the big issues that Your Honor had in front of the sale hearing, which is the pre-sale accident victims saying, you know, you should assume it; you took post-sale accidents, take pre-sale accidents. And the government said no. That was the line that they drew. Certainly there's no suggestion by anybody that anybody thought it was commercially necessary to take a discretionary moral judgment, punitive damages, based on the old entity owned by other people.

And I think that that addresses the assumed liability issue. I think Your Honor was correct, though, on the other two categories. It really flows from whether it's an

independent claim or a retained liability. If it's a retained liability, there's no punitives. If it's an independent claim, it will be up to the fact finder in some other court to decide whether a meritorious claim has been made. But it has to be based on whether there's an independent claim.

The imputation issue, I think the plaintiffs called it a red-herring issue, and I wouldn't say it was a red-herring issue, but I'm not sure how much we disagree because fundamentally, at the end of the day, it -- to me, it relates to whether the claims that they're asserting are retained liabilities or assumed liabilities, and the imputation issue only has the relevance for that purpose.

New GM's argument is that you can't impute knowledge of events that took place at Old GM automatically and on a wholesale basis to New GM as of the 363 sale closing. And I think, Your Honor, in your April 15th decision actually said that that was true and that you hadn't based your decision on any kind of automatic or mechanical imputation from agency doctrine and which you thought would be a doubtful wisdom.

THE COURT: And what we're talking about, too, or if you can Weisfelner v. Fund 1 to be different kinds of imputation. Weisfelner v. Fund 1 involved, insofar as it's relevant here, an intentionally fraudulent conveyance claim. And his opponent in that case, or his partner's opponent in that case, had argued that the only way you can decide whether

to engage in an LBO is by an action of the board, and you can't impute the -- and there was evidence in that case to show that the CEO had enough evil knowledge -- to the board without -- automatically.

And that was what I addressed there. What I was talking about in this case was in deciding what's a new claim, which is a matter of federal bankruptcy law, how much knowledge is required to establish the imputation appropriate to make it a known claim. And I ruled in substance I didn't need to decide whether one person or a factory worker would be enough because of the nature and level of the people who had the knowledge.

What we're talking about in the tort context is a third kind of imputation, that which is necessary as a matter of state tort law or maybe some miscellaneous federal law. And I'm saying -- or I'm asking myself, why do I need to decide that? Why don't I let Jesse Furman decide that. And I think that's where I'm still headed.

MR. STEINBERG: Okay. Well, I think, Your Honor -- the reason why I think it's important for you to decide some of this, right -- it doesn't have to be all of this, but some of this -- is that if they're asserting a retained liability, then they are violative of the sale order. And Your Honor talked about you can't do it as a dressed-up successor liability claim. Judge Bernstein talked -- used the same kind of concept

when he -- and Burton when he talked about it, as well, too.

And the question is whether they took a retained liability and made it -- and ARE asserting it as an independent claim, but it's really just a retained liability. And that's the gatekeeping function that you have. If what they are asserting, based on what they pled and based on the sale order and based on the sale agreement, is a retained liability, then I think they're not allowed to go forward. We've come to you in past times to say to Your Honor, don't let these actions go forward because they're retained liabilities.

If they are asserting something that is purely an independent claim, then I think Judge Furman should decide the merits of that claim. But if it's not, and I think I can go through each one of the causes of action, and that's why I think it's important to not deal with this on sort of a macro high-up level, but you need to do it on a micro level as to what it is they're actually alleging to see that what they're alleging is improper.

And if I can -- if it's helpful to Your Honor, I could talk about -- a little about the marked pleadings and what I was talking about, and then I'll go back to the imputation.

The NDL complaint lists 63 individuals who were named as plaintiffs in the pre-sale consolidated complaint. Your Honor had said that that action, the pre-sale consolidated

complaint, was barred by the sale order. So when they went to amend, they just created a new complaint and kept the same plaintiffs there and basically asserted the same causes of action. They may have taken out the words "successor liability," but otherwise it's the same fundamental claims that are being asserted there.

They asserted 40 additional plaintiffs that are used car purchasers. Your Honor had decided that used car purchasers who didn't buy from any relation to GM are fundamentally the same as the original purchasers, and therefore they don't have claims, either, and those are barred by the sale. So when you look at it, there are 130 named --

THE COURT: These are economic loss claims we're talking about.

MR. STEINBERG: That's correct. That's correct.

THE COURT: I mean, if somebody buys a used car, GM car, and is hurt afterwards, you would agree that that's a different situation.

MR. STEINBERG: That's correct. That's an assumed liability. I'm now focused on the NDL complaint, which is the economic loss complaint.

THE COURT: All right.

MR. STEINBERG: So 80 percent of the named plaintiffs in the NDL complaint are either original purchasers of Old GM vehicles or used car purchasers from people unrelated to Old

GM. And I think we cite it in our no-strike pleading, but if you look at the complaint that we marked up on the NDL, you see examples -- and I'm going to give you five or six, but I can literally give you a hundred because that's what we marked.

Paragraph 36, Melissa Kay bought a used 2006 Chevrolet without a warranty in 2013 from a Toyota dealership. Debra Forge (phonetic) bought a Chevrolet Cobalt in 2007 for $16,000. Eight years later, she claims the car is now worth $6,000. She claims that she would not have bought her vehicle if she knew of the problems with the car. Well, that relates to point-of-sale conduct of Old GM.

Aaron Henderson (phonetic), paragraph 39, bought a car in 2007. Would not have bought the vehicle if he had known about the defects.

Paragraph 40, Marian Snow (phonetic), bought a car in 2005. Would not have bought the car if she had known about the defects.

Paragraph 41, Grace Bedford (phonetic), purchased a Chevrolet Cobalt in 2005. She traded it in almost ten years later. She would not have purchased the car if she knew about the defects.

And the last one -- and I said I could go on -- but Patricia Barker bought a Saturn Ion in 2005. Representations about safety influenced her decision to buy the vehicle in 2005.

Those are the named plaintiffs in these causes of action. That's what colors the entire NDL complaint. That's what they're suing about. And what's their damage theory? Right, specifically what is their damage theory? You've heard the telephone book numbers that are being asserted as to what their claims are worth, but who are the plaintiffs? Who is the potential class parties? Well, it's everybody who owned an Old GM vehicle at any time that is still on the road as of 2014.

That covers not just anybody who would have an ignition switch defect. That covers anybody -- that covers -- that doesn't cover just anybody who bought a car that was the subject of a recall; that covers everybody. They're basically asserting economic loss for 70 million vehicle owners, or whatever it has been reduced to now, even if those vehicle owners didn't have a recalled vehicle.

What's the basis of that? Is it New GM's conduct that they did recalls in 2014, and therefore that alleges damages with respect to someone who bought an Old GM vehicle in 2005 who never had a problem with their car? That's the liability they want to assert on New GM and that's what permeates their seven to $10 billion dollar claim in this case? The majority of those car owners never had their vehicle recalled, and that's the essence of their complaint.

It starts with the plaintiffs, who they named, and it starts with the damages of what they're asserting, and that's

violative of the sale order. That's a gatekeeping function. They're not supposed to sue us for Old GM vehicle owners who never even had a car recalled.

And if you look at all the causes of action, it all relates to, in one way or another, a breach of the recall covenant. The recall covenant was in the sale agreement in Section 6.15. The recall covenant does not use the word "liabilities" and it does not use the word "obligations." The recall covenant says, "Purchaser shall comply with the certification and reporting the part." That's what it is.

And what did they say in their papers? They're saying, I don't have a private right of action to sue for breach of the -- Section 6.15, and my complaint should not be construed as a private right of action.

So instead, what is it that I'm suing for? And my argument to you, Your Honor, is that having conceded that they don't have a private right of action, everything they're suing for, almost all the claims they're suing for as it relates to Old GM vehicles and used car purchases were unrelated to New GM. Everything they're suing for relates to that recall covenant.

And if they don't have a private right of action, then they don't have a claim, no matter how they try to dress it up. So when they sue for third-party beneficiary claims, right, they claim to be the third-party beneficiary of the

recall covenant. They know they can't sue directly for the breach, but they have an account which would be marked in orange on our marked pleading that said that they're a third-party beneficiary.

Well, Section 9.11 of the sale agreement says there's no third-party beneficiaries. So what is the separate obligation that New GM had after obtaining a free and clear sale order with regard to the covenant that it had with the government, which is not part of the assumed retained liability structure, and was purposefully not put in the assigned assumed retained liability structure?

They sue for unjust enrichment. And there, that claim is brought on behalf of defective ignition switch vehicles in the time period before New GM came into existence. It has other people, as well. We're not challenging the other people, but vis-à-vis the Old GM vehicle owner with the defective ignition switch, they argued that New GM was unjustly enriched by a vehicle that was sold by Old GM.

We didn't assume any kind of obligation at all with regard to that, and that was clearly a retained liability. And our fundamental argument is if it's a retained liability, it's not our liability. It's not an ongoing obligation of any.

They sued for failure to file a proof of claim, but they said that if we had announced the recall earlier, they would have known they would have had a problem and they should

be able to file a claim. Well, what was New GM's obligation with respect to filing a claim? Who came to Your Honor to get the bar date noticed, that drafted the bar date notice, who served the bar date notice and was responsible for claims resolution? That was Old GM. That was for purposes of aggregating and determining retained liabilities.

How could that possibly be New GM's claim? How could there possibly be a duty that New GM had with regard to the claims resolution process? There was a creditor's committee who was the watchdog to make sure that unsecured creditors were okay. When the sale was presented to Your Honor, they said the claims process comes after the sale. New GM is gone by then, New GM moves forward, and the estate will work itself through.

That's Old GM conduct. That's Old GM's responsibility. It's not New GM's responsibility. And we're coming to Your Honor to say that that is part of your gatekeeping function. You should not allow those claims to go forward. That's the same claim that was in the Adams no-strike pleading, as well, too. And we have that brief before Your Honor, and that ultimately will be a decision.

But failure to file a proof of claim, unjust enrichment, third-party beneficiary claims, consumer protection statutes. With regard -- not in general, but consumer protection statutes with regard to an Old GM sold vehicle or a consumer protection statute claim with regard to an Old GM sold

vehicle which doesn't even have a recall attached to it, where did New GM pick up a responsibility when the retained liability section of the sale agreement says New GM is not responsible for -- and it says all liabilities, but it does say third parties. New GM is not responsible for third parties for claims based on contract, tort, or other.

And then I think Subdivision 16 of the Retained Liability Section, as an example, the retained liability says, we're not responsible for implied obligations under statute of common law.

The Attorneys General knew what was going on when this sale order was entered. They knew that if it wasn't covered by the Glove Box Warranty or the lemon law claim, or that someone got into an accident, that was it with regard to Old GM vehicles. New GM agreed to Section 6.15, the reporting compliance for NHTSA with respect to Old GM vehicles, but that was an obligation it had to the government. That obligation has a capped liability. New GM has paid the capped liability. But that was a finite responsibility that New GM took on.

New GM did not have a duty -- a post-sale duty to warn. There's lots of states that don't have post-sale duties to warn if you didn't have the free-and-clear aspect that overrides this case. But New GM, once the vehicle was sold, had been in the stream of commerce before the sale, was not responsible for anything other than the reporting requirement

to the government and whatever flowed from that. To manufacture a duty to them is -- our belief, is contrary to the sale, and all of these are issues relating to retained liabilities.

Now, people talked about the deferred prosecution agreement and the information. I'd like to just say a few things about that. One is that New GM pleaded not guilty for the information, but did agree to pay a fine and did agree to a statement of facts. And nothing that I say here today is intended to derogate at all from the statement of facts that New GM agreed to.

But in that statement of facts, Footnote 1 says the following:

> "For the purposes of the statement of facts, to the extent any conduct, statement, actions, or document incurred on or dated before July 10, 2009, references to 'GM' shall mean or intended to mean solely Motors Liquidation Company, previously known as General Motors Corporation, 'Old GM.'"

So everything that's in the statement of facts, you have to see when it was being raised because if was before the sale order, when they say "GM," it refers to Old GM. And then it goes on:

> "Although New GM in the statement admits certain facts about Old GM's acts, conducts, or knowledge

prior to July 10, 2009, based on New GM's current knowledge, New GM does not intend those admissions to imply or suggest that New GM is responsible for any acts, conduct, or knowledge of Old GM, and that such acts, conduct, and knowledge of Old GM can be imputed to New GM."

So specifically, in the statements of facts, there is the word "imputed" in that footnote and said that this is not meant to be a admission that it can be imputed. They can make the argument, if they want, but that was specifically carved out. And then it says:

"His statement of facts is not intended to alter, modify, expand, or otherwise affect any provision of the July 5, 2009 sale order that was issued by the U.S. Bankruptcy Court for the Southern District of New York, or the rights, protections, and responsibilities of New GM under the sale order."

So all of the statement of facts had this provision that said that whatever the rights were under the sale order, we're not trying to change those rights under the sale order; whatever the responsibilities were under the sale agreement, we're not modifying that or changing that.

And that is what I think is the most relevant aspect of this. Our argument is focused on the sale agreement and what the sale agreement provided and what the sale agreement

didn't provide.

Now quickly to touch base on imputation. We do not argue with the fact that there could be circumstances where the knowledge acquired by a New GM employee while working for Old GM could be relevant to a claim or defense by New GM, it is possible, and that the Court's two examples in Bledsoe we think were fair examples of independent conduct.

And I actually think what Mr. Brennan wrote in his paper that if New GM sold a fleet of vehicles and there was a big -- those fleet of vehicles then crashed into an Old GM car, that there might be some responsibility because there's something that tracks them to the New GM side of the equation. I don't think we have a problem with that either. But it's easy to create examples that are so obvious that don't get to the heart of the issue.

Bledsoe, Your Honor had said that importing hundreds of allegations regarding Old GM conduct that was in -- importing hundreds of allegations, conduct was not permissible. You can't blur the distinction by saying something is background, and that's the reason why we flagged everything in the marked complaint which we recognized is -- goes way over the line as to what should be pled or not pled as by way of background.

We don't quarrel with the fact that some of the knowledge that transferred could have a relevance to whatever

the independent claim is that they may have, if they have an independent claim on the areas that we challenged. But the imputation issue has to be framed as follows: A, is there a claim based solely on New GM conduct for which New GM can be held liable? B, should that knowledge -- is there knowledge that is to be imputed as an element of the claim? Because if the knowledge is not relevant to the claim, then the whole imputation issue is irrelevant. And third, is the knowledge, if known to the Old GM employee was who was then hired by New GM, can it be imputed to New GM?

And I think that's what Your Honor was referring to in Weisfelner I, which is under what circumstances will we impute knowledge from an employee to its agent. And in presenting this issue, the plaintiffs actually have the burden of showing which particular knowledge is imputed to which particular employee for purposes of which discreet claim, and then demonstrate why the allegations meet the standard for imputed knowledge. And they've refused to do so because they can't do so.

Merely to say that 24 employees, while working for Old GM, had generalized knowledge of ignition switch defect doesn't get them there. They need to assert what specific knowledge of which Old GM employees being asserted for what independent claim against New GM. Imputation of knowledge doesn't create a duty on New GM that otherwise did not exist.

Knowledge can't be imputed based on what someone should have known as compared to what they actually knew. And the imputation doctrine is based on the presumption that the agent will discharge its knowledge to its principal. I think, again, that's the Weisfelner I example that you're referring to. But the assumption breaks down sometimes in the sale context where the buyer and the seller are contractual adversaries, and there's no automatic presumption that the employee's knowledge will -- acquired will automatically be given to the purchaser.

And that's all we need to say about that. When we cite cases in our opinion, we showed specific examples where a court was refusing to impute the knowledge of a seller employee who went to work for the purchaser on an automatic basis. It didn't withstand scrutiny based on the particular facts. And when they try to distinguish those facts and distinguish those cases, they actually admit to the relevance of where the information came from, which they say is irrelevant. It actually is relevant.

When they tried to distinguish it, they admit my -- the principle that I was advocating, which is that it's not automatic. They want to say that there was 24 people that, on the aggregate knowledge, had knowledge for purposes of establishing their unjust enrichment claim. These 24 people had the imputed knowledge for purposes of establishing their

third-party beneficiary claim, had the knowledge for purposes of saying New GM had a duty when they shouldn't -- that they didn't file a claim which, by the way, they still haven't asked for permission to file a claim.

The knowledge has to relate to a claim. The claim has to relate to a duty that we had --

THE COURT: Well, you are arguing an imputation point or are you arguing a causation point?

MR. STEINBERG: I'm arguing, Your Honor, that imputation, in my mind, only has relevance to the particular claim; that the issue doesn't stand as an isolated point because we concede that there are circumstances where you can impute if knowledge is relevant to the cause of action and if, in that particular circumstances, the cause of action should be imputed to the purchaser entity.

But we don't have to deal with this issue as an academic issue. We actually have an issue -- we've got to deal with this issue in the context of what was filed, and what was filed is not a claim against New GM. And that's why you see in our letter, we say, on this particular issue, the imputation doesn't really matter because there is no claim. It doesn't get you anywhere because of it.

So that's why, without wanting to say I agreed with Mr. Weintraub when he called it a red herring, it is not a red herring, but it's inextricably linked to whether actually a

claim, and the claim is whether we had an independent duty or it was a retained liability.

And Burton actually is on point. I know that you could try to say that it's not, but in Burton, the judge actually exercised the gatekeeping function and determined that there was no economic -- there was no duty to warn in an economic loss case. That's how Judge Bernstein ruled. He may have decided that there could be circumstances afterward where it may be the case, but he dismissed the economic loss claims on a gatekeeping function, and that was the point that we were trying to make is Burton being applicable. It was an economic loss case where the judge decided the gatekeeping function required him to dismiss the claims because it was otherwise an assertion of a retained liability.

The -- I will also just note that on the deferred prosecution agreement, the government determined that by no later than three years after the sale, that there was an ignition switch defect that New GM knew represented a safety defect. I agree that it doesn't preclude the plaintiffs from arguing an earlier period of time, but I did want to point out the fact that the government took a more measured approach and didn't say there was an automatic imputation on day one so that we were born with a get-out-of-jail-free card and all that other things that have been asserted against us here. You actually have to look at the claim, look at the person's

knowledge, and then make an assessment, and that's a much more disciplined analysis.

Just quickly, to deal with the remaining claims that I haven't talked about, the Bellwether complaints, the accident cases, we've argued that certain causes of action, we clearly have responsibility for as an assumed liability, but other causes of action relating to consumer protection, fraud, those were not part of our assumed liabilities, and those were retained liabilities for the same why economic loss complaints are retained liabilities.

The states' claims, Arizona and California, first, they were required to amend their complaint. They had the option to file a no-strike pleading, but -- they filed a no-strike pleading. They weren't supposed to reargue exactly what they had lost on. So what they did was -- and let's not forget, what they did was is they filed a no-strike pleading, refused to amend their complaint, and then tried to withdraw the reference in this case, which Judge Furman denied. And now the matter is before you on the no-strike pleading.

But they still haven't done what Your Honor had asked them to do. And Your Honor said in the judgment that if you didn't do what I asked you to do, the case should be stayed until the Second Circuit decides the issues on appeal, and that's what we think should happen in this case anyway vis-a-vis the states.

Now, the states clearly have claims that are not something that are barred by the sale order. They do talk about New GM vehicles being sold, but the essence of the states' claims also includes used car purchases for five people who bought used cars from people unrelated to GM. That's why they have all those references to the Old GM vehicles in there, and they're asserting, in effect, claims based on those used car purchaser situations. And that's the reason why we said the states couldn't go forward. They just refused to make those changes.

And, Your Honor, the other claims that are asserted in our other complaints letter, the Section 42(b) misrepresentation by sellers, which is in Rickard's negligent infliction of economic loss, which was in Elliott, negligent failure to identify defects, which was in Benbow, all of those things are different variations of asserting a dress-up claim for a private right of action for breach of the recall covenant.

All of these claims, the fraudulent concealment claims, all relate to the fact, did we have a duty under the sale agreement that we assumed with regard to vehicles sold already by Old GM? The whole structure of the agreement was to identify which liabilities we had and which we didn't have. And I don't think what we're arguing now is in any way contrary to what Your Honor ruled on April 15th.

Actually, the burden is on them. What is it that they think they won? You know, they said we lost, okay, we're appealing. I agree with that. But what is it that they thought that they won? What is the independent claim that they're now asserting which they otherwise could have asserted if Your Honor had not modified the sale order? They'll talk after I come up. They won't be able to identify anything. Whatever they think they have, they alleged that they had, no matter what you did to the sale order, because it relates to the New GM contract.

THE COURT: Well, they're saying that after cars were sold and after they were on the road, as a function of some non-bankruptcy law, New GM had duties to them. If they do it properly, and they're not dumb, so I assume they will, they won't rely on anything Old GM did. And then doesn't the question devolve into whether, as a matter of applicable non-bankruptcy law, such a duty is actionable or not? And if that's so, it sounds to me like it's a Jesse issue.

MR. STEINBERG: Well, Your Honor, first, you said that they're not dumb in how they pled it, if you look to see how they pled it --

THE COURT: Well, obviously some of them were dumb, but now they're going to be educated and now they're going to know what to do, or after I issue my ruling, they're going to know what they can do.

MR. STEINBERG: Well, the only thing I would say to that, Your Honor -- and I'm just responding to your question. And to the extent that Your Honor believes that this was contrary to how you ruled, so be it. We disagree about this point. But when you sell free and clear and say that there's no successor liability and there's no other liabilities except for those identified and assumed, then that's a clearly distinguishing fact that takes you out of the other type of cases. And they could assert whatever duties they think exist as if it was no sale free and clear finding, but I think when you go back to if there was a free and clear finding, which is the basis upon which New GM bought and acted over the last six years, then they don't have a claim.

They just -- otherwise you've now resurrected every retained liability, if it was a retained liability. I don't think Your Honor was trying to say retained liabilities somehow became something different. You needed to have some New GM conduct.

Now, if Old GM's 24 people should have known about the defect so that there were known creditors and this car should have been recalled before, then that was a retained liability. New GM didn't pick up that liability. New GM didn't pick up a duty to -- post-sale duty to warn where Old GM hasn't exercised that remedy.

New GM did pick up the obligation -- to be clear, it

picked up the obligation to comply with Section 6.15, and to the extent that it didn't comply with that, it should be liable for that to the person that it obligated itself to be liable for. It just wasn't the plaintiffs. And you can't make those claims into new independent claims. They are retained liabilities. That is the gatekeeping function.

If Your Honor just gives me one second, I just want to see --

THE COURT: Sure.

MR. STEINBERG: The Consumer Protection cases that were cited which said you didn't have to be the person who actually sold the item in order to be violative of the statute, well, that may be as a general proposition in certain cases in certain circumstances. But in Arizona and in California, and I think we briefed the issue, you do actually have to be the seller for purposes of the circumstance here. Otherwise, we're responsible for someone else's acts. We're responsible for the person who sold the used car, the Toyota dealership who sold a used car to somebody. We didn't pick up that responsibility, and we didn't assume greater responsibilities merely because cars flipped through the resale market which is what Your Honor has said.

Other than that, Your Honor, I know you've given us a lot of time. And although I haven't talked as much as my other adversaries, it's probably still more than you had envisioned,

so I appreciate it.

THE COURT: All right.

MR. WEISFELNER: Your Honor, may we have two or three minutes before rebuttal?

THE COURT: For rebuttal? I'll sit here. We're going to get the thing done, Mr. Weisfelner. And part of the problem is the amount by which it's been lengthened up to this point. So you can caucus for a couple of minutes while I sit here.

MR. WEISFELNER: Thank you, Your Honor.

(Pause in proceedings)

MR. STEINBERG: Your Honor, while Mr. Weisfelner is getting his notes, Mr. Davidson said something -- passed me a note. And I just want to --

THE COURT: Pull the mic closer to you, please.

MR. STEINBERG: Okay. I just want to make it clear that my presentation should not be construed in any way to say that New GM disavows the 20 -- the stipulation of facts that are in the deferred prosecution agreement.

THE COURT: Well, you said that before and I understood that.

(Pause in proceedings)

THE COURT: Mr. Weintraub?

MR. WEINTRAUB: Yes, Your Honor. There was a lot there. I'll try to be succinct. My notes are awful, but so is

my handwriting.

First, Your Honor, I'd like to respond to New GM's arguments about a duty to warn and the argument there is no private right of action under the Safety Act. As Mr. Steinberg said, Burton did say that there could be a duty to warn in a personal injury case. And our cases are personal injury cases. The Bellwethers are personal injury cases.

THE COURT: But the difference is that your guys were actually hurt in car wrecks. The other plaintiffs are asserting a different kind of duty-to-warn claims.

MR. WEINTRAUB: I understand, Your Honor. I'm speaking about the duty to warn with respect to my clients.

THE COURT: Okay.

MR. WEINTRAUB: Whether there is a duty to warn or not, we believe, as Your Honor said, as a defense to the plaintiffs' claims, we don't think the gate-keeping function includes determining the merits of underlying claims. Therefore, the duty-to-warn issue is a red herring in this proceeding.

I would note that New GM assumed liability for post-sale accidents and it assumed responsibility for compliance with the Safety Act for pre-sale vehicles. New GM also, within the context of the foregoing, had superior knowledge and moral obligations to not let people be injured or killed riding around in GM cars --

THE COURT: Again, you're making the same distinction, or you're triggering the same distinction I made before.

MR. WEISFELNER: If I --

THE COURT: If there is a duty to warn under the Safety Act, but if the sale agreement said -- and sale orders say in baby talk you're not third-party beneficiaries of that, it may be that as a matter of non-bankruptcy law, somebody who's hurt because of a failure to comply with that duty to warn might have a cause of action against New GM for that additional reason as well. But that doesn't go to whether somebody who wasn't hurt and the victim of an assumed claim would have that duty. And that would be something that either Jesse or a State Court judge would decide, right?

MR. WEINTRAUB: I don't disagree with that. And again, I only represent people who were, in fact, hurt.

THE COURT: Okay. Go on.

MR. WEINTRAUB: And we cited in our brief, and I didn't talk about it the first time, whether or not there's a private right of action in the Safety Act, the cases recognize that if a statute that is intended to protect people is violated, whether or not there's a private right of action, that violation can be evidence of negligence, gross negligence, or similar misconduct.

So our view is GM assumed responsibility for recalls.

And the failure to do a recall when it knew that it should have done a recall is either negligent or reckless or worse --

THE COURT: And let's conclude this discussion because I think I understand the distinction.

You're saying that that set of facts gives your clients direct rights of action not as third-party beneficiaries.

MR. WEINTRAUB: That's right, Your Honor.

THE COURT: I understand.

MR. WEINTRAUB: Okay. Again, we don't believe that it is proper to conflate Old GM conduct with New GM knowledge. And this is with respect to independent claims. And we also believe that conduct that creates knowledge is fair game. And by that I mean if there's been an investigation by Old GM into whether or not there's a defect in the ignition switch, and that defect -- that investigation reveals that there is or that there likely is, separate from the conduct of the investigation and separate from the failure to initiate the recall, that investigation created knowledge. And we believe that that knowledge was transferred to New GM. Now, whether or not that knowledge can be imputed, that's for a different Court to decide. That's for the Trial Court to decide. That's for Judge Furman to decide. But the fact that the parties want to assert that there was knowledge that can be imputed cannot be -- they should not be prevented from making that argument to the

appropriate Court.

Now, Mr. Steinberg said quite a bit about assumed liabilities. And he had a very convoluted explanation for how you can stare at the words long enough on a page and they can begin to blur and move around and maybe they say something other than what the plain language says. But the plain language does not exclude punitive damages. Everything that Mr. Steinberg said about the evolution of the different versions of the Section 2.3(a)(9) was hearsay, was parol evidence.

What actually happened was Section 2.3(a)(9) landed in the form of the amendment to the purchase agreement. That is the language that must be interpreted. That is the language that must be dealt with. And there's no way to get around -- there's no way to bring in all of this extraneous information about what people are thinking or not thinking, or what the creditors' committee might have done or might not have done into looking at the plain language of the contract.

And I would tell Your Honor that if this supposed clarification was done to exclude punitive damages, it failed miserably. It didn't do that. And there is no indication that anyone thought that the inclusion or the exclusion of punitive damages in 2.3(a)(9) was an issue that people were objecting to or saying it's got to be taken out or it's got to be clarified. So far as I can tell from the record, punitive damages was not

an issue with respect to particular objections. And, again, if people wanted to exclude punitive damages, you say, "excluding punitive damages."

The structure of the retained liabilities is very clear. Retained liabilities are limited to liabilities of the seller. They're not post-closing independent claims of New GM. To the extent that there's any language in retained liabilities about claims that arise after the closing date, that has to do with claims that will arise against New -- I'm sorry, Old GM after the closing date. It cannot be a preemptive get-out-of-jail-free card for whatever New GM might do post-closing. That's just not the way to read retained liabilities. The only thing retained liabilities retained were liabilities that the seller didn't do anything with respect to the liabilities of New GM.

With respect to the words of Section 2.3(a)(9), it uses the defined term "product liabilities." There's a lot of words leading up to what product liabilities within the meaning of Section 2.3(a)(9) means. Whether or not the generic lowercase word "product liability" would exclude punitive damages is irrelevant. The defined term in this agreement is what controls. They could have called it "pizza." It's still what the words compiling or composing the definition mean. And there is nothing in this definition, and there's nothing in the word "direct" and there's nothing in the word -- words "caused

by" that would say that an accident that was caused by reprehensible non-disclosure by New GM cannot be subject to a claim for punitive damages.

And this is not -- and as we said in our brief and as I said in oral argument earlier, there is not unfettered discretion to punish a wrongdoer for damages done to people other than the specific plaintiff in the specific injury. There has got to be proportionality of the damages to the actual damages, or the compensatory damages. And one of the recognized and -- we said this in our brief, we said this earlier -- one of the recognized purposes of punitive damages is retribution. It's not just to discourage third parties. It's not just to discourage repeat offenses by the particular defendant. It's compensation. It is an eye-for-an-eye retribution for the wrong that was done to a person in an egregious way. And there's nothing in 2.3(a)(9) that would limit that way.

With respect to the commentary about you can't assign a claim for punitive damages, this is not an assignment of a claim for punitive damages. This is assumption of liabilities in connection with a purchase agreement that left the seller bereft of any ability to pay for the damages. And it's a recognized construct outside of bankruptcy law that successors can be successors for liability, including punitive damages because they succeed to all of the liabilities of the

predecessor.

I talked earlier about commercial necessity. Again, I think that that is parol evidence and it's hearsay. Commercial necessity is not mentioned in the sale agreement. It's not mentioned in the sale order. And it is subject to convenient revisionist history. And, therefore, it's not a credible standard. And again, the integration clause would prevent any commentary about whether or not something was commercially necessary. The agreement speaks for itself.

Now, with respect to the Adams complaint, as we said, this was a pre-sale. These are pre-sale accident victims, not post-sale. These are pre-sale. In the four threshold issues that were determined in April of 2015, there was an acknowledgment process violation. New GM, we contend, under the purchase agreement, had a duty to recall. New GM knew about the ignition switch defect, we contend, because it either developed knowledge or at that point it would have been inherited knowledge because it was so close to the bar date because of inherited knowledge. And we understand that we would have to prove that, that that's not blanket imputation, but that would be part of our proof in the case. And we believe that the failure to recall, as I said earlier, is evidence of negligence. And the negligence proximately caused these claimants not to file a proof of claim because they were unaware of the ignition switch defect.

Had New GM complied with its obligation to initiate a recall, these claimants would have known that they should have filed proofs of claim before the bar date. By New GM not initiating a recall and waiting until 2012, long after the bar date, these people were prevented from the ability to file a proof of claim in a timely manner. Had they filed a proof of claim in a timely manner, they would have been paid along with all of the other general unsecured creditors the amount of their damages and they wouldn't have been injured. New GM's negligence is the proximate cause of the damage sustained by these plaintiffs.

So we think that that complaint should not be stricken and these plaintiffs should be given the opportunity to prove their case, which would include imputation of negligence.

Two last points, Your Honor. The fact that the claim for punitive damages is subordinated and, in this case, this debtor was insolvent does not mean that it would receive no distributions. The claim is not a disallowed claim. It just so happens because this particular debtor was insolvent that the Bankruptcy Code would subordinate those claims to other creditors. That doesn't mean that you don't assume the liability.

The argument that you would equate the assumed liability to the distributions that are received would mean

that the liability that New GM says it assumed here would be 30 cents on the dollar for compensatory damage claims. And if this was a zero case, it would have been zero for compensatory damage claims. That can't be the law. The words of the law that when somebody issues a guaranty, that the guaranty is only of the amount distributable in the Chapter 11 case to the creditor. The guaranty is of the full amount of the liability. And that's what happened here. There was an assumption of the full amount of the liability, not the distributable portion of that liability in the Chapter 11 case. That would have made every guaranty and every assumption of liability vary from case-to-case depending upon the amount of distribution, and that's not the law.

THE COURT: So are you saying that even though creditors, if they had timely filed claims, would have only gotten 30 cents on the dollar, that New GM is liable for 100 cents on the dollar for anybody who didn't file a claim?

MR. WEINTRAUB: I'm saying two different things, Your Honor. With respect to the -- and, again, I made transitions too rapidly. With respect to the Adams case which has to do with pre-sale accident victims, they would be entitled to recover whatever general unsecured creditors got in this case. So that would be 30 cents on the dollar, or whatever the distribution was.

THE COURT: They'd be entitled to recover from New GM

for what the other creditors got from the Gov Trust?

MR. WEINTRAUB: Right. Because had they filed timely proofs of claim, they would have shared along with the other creditors.

What ended up happening here was they were not aware of the ignition switch defect. So by the time they got around to filing claims, Your Honor had already ruled that they're equitably moot and they get zero. So they were clearly damaged as a result of not filing a timely proof of claim. It's a difference between getting 30 cents and getting zero because of equitable mootness.

My point on the subordination and the punitive damages was -- and this goes back to assumed liabilities for post --

THE COURT: Your point on that which you made in your brief was that subordination isn't the same as disallowance.

MR. WEINTRAUB: Yes, sir.

THE COURT: I understood that.

MR. WEINTRAUB: For post-sale.

Thank you, Your Honor.

THE COURT: Okay. Mr. Weisfelner, very briefly.

MR. WEISFELNER: Yes, Your Honor.

Mr. Berman is going to address the contentions that Mr. Steinberg made that we asserted no independent claims in any of the second amended consolidated complaint or either of

the two State Court lawsuits. If Your Honor needs that, then that will be addressed on a cause-of-action-by-cause-of-action basis as Mr. Steinberg did in his opening remarks.

I get up out of an abundance of fear. I fully appreciate and recognize what Your Honor has written with regard to due process violations and the necessity for prejudice. And as Your Honor knows, that portion of Your Honor's decision is subject to our appeal.

But what continues to bug me, and I'd ask Your Honor just to keep this in mind, so much of GM's argument is predicated on the distinction between assumed liabilities and retained liabilities. And understandably so. And Mr. Steinberg says, listen, if you're suing us now, even if you're asserting a claim against New GM, that claim against New GM may have been cut off as a retained liability, and therefore, you're violating the sale order by going forward. Well, I think that's nonsense. I think to the extent that you've articulated an independent claim against New GM based on its own acts or conduct, that you can eventually prove to a trier of fact, then the fact that it imputes knowledge, which you'd have to prove as part of your claim, or refers or relates to conduct -- I'm sorry, knowledge of Old GM is irrelevant.

But here's the point I wanted to drive at. Since there's such a large reliance on what the contract said at the time it was formed, let's remember a couple of undisputed

facts. When Your Honor conducted the hearings in 2009, neither Your Honor knew, nor any of the parties disclosed, and the plaintiff representatives were unaware of the fact that Old GM had manufactured and put into commerce deadly unsafe vehicles. Had Your Honor been aware, first of all, that they had manufactured and put into commerce deadly vehicles, safety concerns that would have required, as Your Honor determined, a recall, query the extent to which the contract would have been modified, query. Beyond that, Your Honor, what we didn't know in 2009, but we do know now is that post-sale New GM knew there was a known safety defect, it was killing people, it would continue to kill people, and New GM for years concealed that information for cost reasons and failed to disclose it.

Your Honor, I suggest that had we known in 2009 what New GM intended to do for the next number of years, it would have changed that dividing line between assumed liabilities and retained liabilities.

THE COURT: Mr. Weisfelner, if you're looking for a reservation of rights for what you might do if the Circuit reverses me, you don't need to say it. But I'll say it again. You've got a reservation of rights.

If you're trying to re-argue something that I ruled on in excruciating detail on April 15th, now is not the time to do it.

MR. WEISFELNER: And, Your Honor, I was attempting to

do neither. All I was attempting to do was to the extent that GM's position today relies as it does on a dividing line between what was and wasn't and assumed versus retained liability, the current state of the record as a matter of law is Your Honor has determined that the sale order was over-broad.

THE COURT: I know that, Mr. Weisfelner. I know the distinction, and I put it in Part 3 of my April 15th decision that I was not considering that which was assumed and not assumed to be significant to the determination of what might be an independent claim.

But please don't test my patience on this.

MR. WEISFELNER: Thank you.

THE COURT: Mr. Berman?

MR. BERMAN: Your Honor, Steve Berman on behalf of the States and the MDL economic loss patients. And I'll be very brief and try not to test your patience.

First, I want to make a point on the State complaints. Mr. Steinberg said that GM --

THE COURT: Pull the mic a little closer to you, please, Mr. Berman.

MR. BERMAN: Mr. Steinberg said that GM has no issue with claims involving New GM cars and certified cars. The State of Arizona in Paragraph 496 and 497 defines which claims it's putting in and which cars it's suing on behalf of, and it

defines it clearly that the only vehicles at issue are those sold or leased after July 11th, 2009. So there's no basis to continue the stay in the State of Arizona case because it's not triggering any claims involving Old GM cars.

And the same is true for the State of California. The State of California in Paragraph 1 and in Paragraph 255 says that its claims seek remedies in connection with three types of vehicles: New GM vehicles; New GM certified vehicles; and repairs on cars using defective ignition switches. All three of those are fair game by GM's own admission. So there is no reason to continue the stay in the State of California case.

The fact that this -- that the State of California, for example, is focusing solely on New GM is made clear by the statute of limitations which doesn't allow it to bring claims further back than 2010 after the sale order.

THE COURT: I think what Mr. Steinberg was complaining about was not bringing claims that accrued after the date, but relying upon Old GM conduct as a predicate for those claims.

MR. BERMAN: Well, we -- we did exactly what the Justice Department did in our complaint.

THE COURT: You did exactly what?

MR. BERMAN: What the DOJ did. The DOJ cited to Old Gm's conduct 64 times. Sixty-four times. And then it went and

gave examples of New GM conduct furthering the wrongdoing. That's exactly what the States did. In fact, I think we cited less to Old GM conduct than the DOJ did.

THE COURT: But the distinction is nobody's asking me to rule on what the DOJ did. And the DOJ action was brought after this matter was before me without opportunity for me to consider that. And New GM, for reasons that I can well understand, was perfectly willing to let the DOJ do what it needed.

You're trying to recover money, and not just injunctive relief, from New GM which you may or may not be entitled to. Frankly, if you had only asked for injunctive relief, my guess is you would have gotten that in a heartbeat.

MR. BERMAN: Well, we're asking for civil penalties. And the civil penalties are predicated on the wrongdoing that GM did from 2009 forward. GM knew of the facts that are alleged in the complaint, the Old GM facts. GM continued to gather information about the ignition switch defect and other defects, and it remained silent to consumers who were purchasing their cars. That states a claim based on New GM misconduct. And I don't think it's improper to have set up the claim in part by the Old GM conduct.

I referred to the DOJ just because it's another prosecutor looking how to state this by way of example, and I think it shows that we weren't trying to do anything that ran

afoul of your order because we were using those old facts to show what GM knew in 2009 when it continued to sell to folks in Arizona and California without telling the truth.

With respect to the issue of the various claims in the MDL complaint, I respectfully submit that's an issue for Judge Furman. For example, Mr. Steinberg says, well, you've got some plaintiffs in there who bought cars before New GM came into existence, and you're claiming that they were injured. And the complaint explains why they were injured. And I'll give you an example, at Paragraph 1316.

So the thrust of the amended complaint in the MDL is not just the ignition switch, but that GM was hiding the fact that its culture, its cost-cutting, its quality control was out of control. So there were 54 defects that were issued in 2014.

When that happened, the value of everyone's car went down, including people who had cars they bought before New GM came into existence. With respect to those people, we allege that New GM had a duty when it came into existence to have recalled cars far earlier than they did, to have maintained its quality, and when the news came out that they had done none of the above, that they have lied about their quality, everyone's vehicle was hurt, including people that had Old GM cars. They were hurt by the conduct of New GM.

Now, Your Honor, I could be wrong. Maybe that claim is going to be stricken as a matter of state law by Judge

Furman. But the answer to that question of whether there's a claim is dependent on an analysis of state law. And it's going to be different by various states and Judge Furman, I submit, has the task of deciding is there a claim stated.

And the same goes to the imputation issue. We gave you cases involving laws in various states interpreting when imputation is proper and when it's not. That, again, is something that I submit Judge Furman's going to have to do on a state-by-state basis.

MR. BERMAN: And there was no automatic imputation. There's over a hundred pages of very specific allegations of names and dates and people who were involved in hiding the imputation issue. Those facts are relevant to each of the claims because at the heart of each claim is a concealment of facts that New GM was aware of and New GM's continuing coverup from 2009 to 2014. So we don't have to sit down and go through each cause of action as to how the imputation facts apply because they apply equally to all.

The thing that struck me the most about what Mr. Steinberg said was the following. He said, there has to be a volitional act of New GM, and if Your Honor wants to look at just one cause of action, it shows that for every person in the class, there was a volitional act of New GM. Let's take fraudulent concealment, looking at Paragraph 1157 through 1158. It says, "New GM concealed and suppressed material facts

concerning the quality of its vehicles and the GM brand." 158, "New GM concealed and suppressed material facts regarding the culture of the company." They made -- it was avoiding dealing with safety issues, and it was a cost-cutting company, not a quality company. And 1159, "New GM concealed and suppressed material facts concerning the serious defects plaguing GM brand of vehicles." All of the causes of action are very identical in that they focus on the misconduct of New GM. And because of that, we do not believe that there's a violation of your order.

And I'll take one last claim, and that's the unjust enrichment claim. Mr. Steinberg said, how can be sued for unjust enrichment? Well, first, at Paragraph 1288, we described that the unjust enrichment claim is brought on behalf of owners who purchased new GM vehicles, he's conceded that's okay, certified pre-owned vehicles, he's conceded that's okay, and those who had purchased a defective ignition switch vehicle before New GM came into existence. And he says, well, how can we be tagged New GM for unjust enrichment? Well, in Paragraph 1291, we explain how New GM was unjustly enriched by failing to recall these cars and by failing to correct it's improper representations.

Now, it could be that Judge Furman says that doesn't state a cause of action under state law, that New GM had no duty or was not unjustly enriched as defined by state unjust enrichment case law, but that, I submit, is for Judge Furman to

decide. We may lose, I don't know, but I think it's another gatekeeper and not this court. Unless you have any questions of me, Your Honor, that's all I have.

THE COURT: No. No, thank you.

All right. Mr. Steinberg, limit it to the new stuff that we just heard.

MR. STEINBERG: Right. Mr. Weintraub said punitive damages were not raised as an issue for any particular objection to the sale. We agree with that, and we think that's relevant. With regard to they said that this is retribution, emphasizes the aspect of retribution, an eye for an eye, well, compensatory damages is an eye for an eye. Punitive damages is something different than an eye for an eye. And New GM agreed to pay compensatory damages to accident victims.

Mr. Weintraub said conduct that creates knowledge -- I'm sorry, conduct that creates knowledge must relate to the cause of action. Knowledge itself can create a duty that was proscribed by the sale order as a retained liability, and that's an argument that we've made that they just don't seem to accept.

Successor liability. The argument against public policy that you can assign a punitive damage exposure, I think he essentially agreed that you couldn't do it, which would then take 2.3(a)(9) out of the picture. He's saying that he's now resting on the fact that it's a successor liability claim and

that if you said that New GM was the successor to Old GM, they're liable for punitive damages. And that, we say, is barred by the sale order. But by making -- by saying that -- by this being his argument to attack the public policy argument, he's essentially saying that it's not an issue of whether the liability was actually assigned to -- or assumed by New GM.

Just to clarify, if I didn't say it before, Your Honor has ruled in a couple of different cases about that New GM is only assuming liabilities that were commercially necessary. It's commercially necessary, as determined in 2009 at the time of the sale order. It's not a slippery slope. It's not -- doesn't change by what it is now. It's what the Court found in 2009.

The entire gatekeeping issue, we've argued in our papers, is really an element of the Old GM threshold issue, which was that when Your Honor put the Old GM threshold issue on the table, it was to determine whether the claims that were actually being asserted by the plaintiffs here were Old GM claims or New GM claims. And if they were dressed up claims in some way, they will retain liabilities. That was the purpose of the gatekeeping function.

The Adams case that Mr. Weintraub refers to, these were pre-sale accident cases. Those plaintiffs knew they were in an accident prior to the bankruptcy. What they knew about

why they got into an accident, the one thing they had definitely knew is that they got into an accident, and it's not illogical to think that there could be a claim against the manufacturer. You may not know what the particular claim is, but Your Honor has ruled in other situations that a pre-sale accident case at least knew that they were in an accident, and therefore, they were aware of the necessity to file a claim by the bar date.

The -- to the extent that Mr. --

THE COURT: So are you therefore saying that I don't need to reach the broader issue as to whether any and all other people, other than the Adams plaintiffs, who were deprived of the opportunity, according to the plaintiffs, to file claims by reason of New GM's conduct would have the ability to assert claims against New GM?

MR. STEINBERG: Now, I think that that's the issue that resolves the Adams case, but in the MDL complaint, the same cause of action is raised in the economic loss circumstance, so you need to deal with it in that circumstance.

THE COURT: They're asserting that New GM's liable for their failure to file claims.

MR. STEINBERG: For economic losses.

THE COURT: For economic loss. All right.

MR. STEINBERG: And to follow Mr. Berman's analogy, that's not also within your gatekeeping function. Effectively,

they're allowed to say whatever they want, and if it's clear that it's a retained liability to everyone except them, they're saying, let me take my shot. And it's not just Judge Furman, right? Because there are other cases that are not in the MDL, they're all throughout the country, including the Arizona and California actions. The moment the stay is lifted, that doesn't go before Judge Furman, that goes back into a California judge.

THE COURT: Uh-huh.

MR. STEINBERG: The -- just to say again, Mr. Weisfelner said that I had articulated a proposition that there is nothing in the MDL complaint that is an independent claim, and that's clearly not true. I've said that New GM sold vehicles, barring independent claim when we weren't coming before Your Honor, I said certified pre-owned was not before Your Honor. I do think that issues relating to old GM vehicles and used -- old GM vehicles that were sold used after the sale are clearly within your jurisdiction, and that's what we're coming to Your Honor for, with respect to each of the counts that were identified.

The argument that we have not set forth a retained liability, we have articulated independent claim actually just assumes the conclusion. The whole purpose of coming to Your Honor is to challenge that. They've acted brazenly by suing the four or coming to Your Honor saying, I've asserted an

independent claim and I don't have to come and deal with Your Honor. They ultimately agreed that Your Honor could exercise the gatekeeping function, but in order to exercise the gatekeeping function, you actually need to determine whether what they've asserted is a prima facie independent claim. And merely to say, well, maybe I -- what I asserted just doesn't withstand any scrutiny at all, I don't think New GM exposed itself as part of the sale to those types of claims.

The Arizona case, the Arizona state case -- and just to be clear, I don't care what the statute of limitations says, they're suing New GM for violations with regard to used car sales after the sale order which relate to Old GM vehicles. That's what they're alleging, and that's something that we're bringing before Your Honor, that limited aspect of it.

To the extent that there are Old GM vehicles that were sold after the sale that they're looking to assess fines and penalties and everything else, where the vehicles were not sold by New GM or a New GM dealer but was sold by an independent third party, a father selling it to a son, a Toyota dealer selling it because it was traded in by somebody else, that's not a New GM liability. Your Honor, I think, has ruled on that before, and that's what's clearly actionable.

And, you know, the fact that they didn't know how to plead correctly, they used GM-branded vehicles, and the fact that they want to say that they did exactly what the DOJ did,

Your Honor had ruled before that they had done something improper, that they had alleged too many conduct claims, they had alleged too many types of allegations and they needed to clean it up to be specific and not blur what they're really asking for, and they just ignored that. Now they're coming in as if that never happened before.

The -- Mr. Berman said he's not asserting automatic imputation at all, but he wants to be able to prove his case. Everything that they've ever said to Your Honor before that statement was made was that New GM was not born innocent and everything is automatically imputed immediately on day one, so that is a difference in a view that has been articulated now.

And finally, this is not a circumstance where you can just ignore the fact that there was a 363 sale order that gave these assets to New GM free and clear of liabilities that Old GM had. And everything that they're asserting with regard to vehicles that were sold by Old GM is a retained liability, especially in the way they've articulated their claims, the third-party beneficiary claim with regard to an Old GM vehicle that was sold by Old GM.

The ability to seek damages as part of a class for people who weren't even subject to a recall, which was an Old GM vehicle, those were clearly barred by the sale order. That is our position, and that is what we're asking Your Honor to rule upon. Thank you.

MR. WEINTRAUB: Your Honor, could I just respond to two points that -- where Mr. Steinberg said I conceded something which I did not concede, and then I will sit down.

THE COURT: All right.

MR. WEINTRAUB: Thank you, Your Honor. With respect to the Adams complaint, Your Honor, that is a pre-sale ignition switch defect accident plaintiff or group of plaintiffs. This Court ruled that there was a due process violation to this group and that they could seek leave to file late claims. However, the Court also ruled that any late claims, even if allowed, would not receive anything because of equitable mootness. That is what defines our damages, and it's based upon the due process violation, which the Court found, and the fact that the late claim, per the equitable mootness argument, would be worthless. So I didn't concede that people knew they had an accident and they can't file claims. I never said that.

With respect to the issue of an assignment of the right to collect punitive damages, to me, Your Honor, that's a champerty issue. We're not talking about that. We're talking about assumption of liabilities in connection with a sale agreement, so it's apples and oranges. Thank you, Your Honor.

THE COURT: All right.

MR. STEINBERG: Just one based on that last point, Your Honor. I would just ask Your Honor to, if that is an important point for your decision about the public policy about

assigning punitive damages, read our cases that we cite in our briefs, and you'll see that none of them are champerty-type cases. They're in the insurance context where they're saying the insurance carrier shouldn't have to pay for this because she shouldn't be able to assign it.

That's the -- the only other thing I would want to mention, if Your Honor is closing this hearing, is that there is something called the Dunsmore matter, and we're asking for Your Honor to give us direction as to when you think we need to respond to that. That's the guy in California who's in prison, who filed some kind of complaint, and there's some kind of hearing in the beginning of November, and we're just not sure how that relates to it, so --

THE COURT: What is the Dunsmore matter?

MR. DAVIDSON: Sorry, Your Honor. Scott Davidson from King & Spalding. These were pleadings that were sent to Your Honor by a pro se plaintiff who is in prison in California. They were filed yesterday on the docket. They concern this matter. They concern this because we sent him a demand letter because his complaint contains a pre-sale accident. So he did send certain pleadings to Your Honor, which were docketed yesterday, so we're just not sure how to respond to them or when to respond to them. And the hearing is in the California court at the beginning of November.

THE COURT: He is suing on a pre-petition claim that

would be of the type of the other guys that Mr. Weintraub's been representing?

MR. DAVIDSON: It's -- it involves --

THE COURT: But he's bringing it pro se and he's calendared it for a hearing in California?

MR. DAVIDSON: There's a status conference in California on November 3rd, but it's -- the case concerns a pre-sale accident that he was involved in. But he's appearing pro se. He's actually in prison in California.

THE COURT: And this was filed yesterday?

MR. DAVIDSON: Well, it was docketed yesterday, yes. I got like three motions with various forms of relief.

THE COURT: On ECF?

MR. DAVIDSON: Yes.

THE COURT: And how or for what purpose was it docketed before me?

MR. DAVIDSON: Well, I believe it was mailed to you by Mr. Dunsmore, and we also actually sent you copies because we got them, as well, and did not see them docketed.

THE COURT: I assume that all would agree that unless and until I take other action, it's stayed under any and all of my earlier rulings.

MR. DAVIDSON: Okay. Thank you, Your Honor.

THE COURT: Well, no. I'm asking that as a question.

MR. DAVIDSON: Yeah. I mean, we believe so, yes.

THE COURT: Mr. Weintraub, do you see any reason why he wouldn't be in a different category than any of your other guys?

MR. WEINTRAUB: No, Your Honor. I was marginally aware of this. I was called at one point by Mr. Dunsmore's mother. What I understood from her, and I may have misunderstood it, was this was a post-sale accident case. It may not be. So I referred her to Mr. Hilliard, and I don't know what happened after that. But if it's a pre-sale case, I think that they are in along with everyone else who's in the pre-sale boat.

THE COURT: All right. Here's what we're going to do, folks. This may be a grain of sand on the beach of the expenses that's been devoted to litigating issues in this case, but I'm going to issue and endorse an order that says that his action is stayed until the further order of this Court be made and that it's without prejudice for anybody to bring facts to my attention of which I'm not presently aware. And it's also subject to the effect, if any, of any further rulings that I, my successor, or this circuit issue in this case.

And for the time being, until and unless you hear from me to the contrary, nobody needs to do anything else.

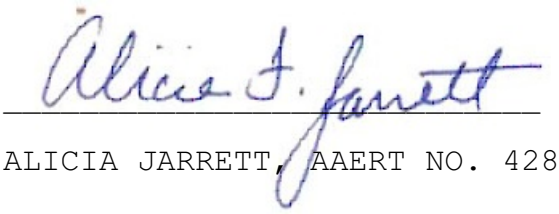
MR. DAVIDSON: Thank you, Your Honor.

THE COURT: All right. Court adjourned.

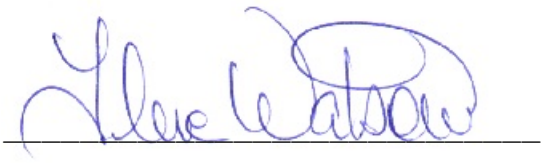
(Concluded at 1:22 p.m.)

**C E R T I F I C A T I O N**

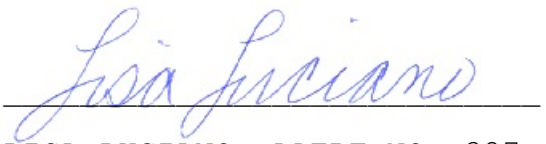
We, Alicia Jarrett, Ilene Watson, and Lisa Luciano, court-approved transcribers, hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.



ALICIA JARRETT, AAERT NO. 428 DATE: October 15, 2015
ACCESS TRANSCRIPTS, LLC



ILENE WATSON, AAERT NO. 447 DATE: October 15, 2015
ACCESS TRANSCRIPTS, LLC



LISA LUCIANO, AAERT NO. 327 DATE: October 15, 2015
ACCESS TRANSCRIPTS, LLC